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From Marshall to Mukherjea

Studies in American and Indian Constitutional Law

by

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THE TAGORE LECTURES (1939)

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CALCUTTA, INDIA • JULY 1955

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FOREWORD

The United States has had fourteen Chief Justices, John Marshall being the fourth and Earl Warren the fourteenth. The growth of American constitutional law, therefore, antedates Marshall. But many of the main currents that are felt to this day started with him. So it is that he is the one with whom we Americans identify the origin of our basic constitutional doctrines. The span from Marshall, who started his service in 1801, to Warren, who took his seat in 1953, is short in world history. But in that period there has been a vast evolution of our concepts of governmental power and of the rights of man. It is with those larger developments that these Lectures deal—from *Marbury* v. *Madison*, 1 Cranch 137, written by Marshall, to *Brown* v. *Board of Education*, 347 U. S. 483, written by Warren.

What follows is not, however, an American treatise. India is a part of the story. Though India has had a Constitution only since 1949, her rate of evolution is at a much faster tempo than marked our early years. The pressures of the complex forces of twentieth century Asia have thrust on India problems of a dimension hardly yet appreciated by the West. India has been tackling those problems within the framework of a democratic society under a government of laws, not of men. Hence I have marked the period included in these Lectures not only by the period from Marshall to Warren, but also from the time of India's independence to the day late in 1954 when Bijan Kumar Mukherjea, serving in an illustrious line, became India's fourth Chief Justice.

Marshall and Mukherjea are in the same tradition.

It was Chief Justice Marshall who wrote in *Marbury* v. *Madison*, 1 Cranch 137, 176, "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the

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nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

It was Chief Justice Mukherjea who wrote in *Deo* v. *Orissa*, 16 Sup. Ct. Jour. 592, 597–598:

"If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not . . . transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect . . . . In other words, it is the substance of the Act that is material and not merely the form or outward appearance. . . . The legislature cannot violate the constitutional prohibitions by employing an indirect method."

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I

The American and Indian Experiments

A. *The Ultima Ratio.*

Justice Holmes often expressed his philosophy that force was the sanction of law, that force rather than justice was the ultimate. In the year 1920, Holmes wrote, "I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force." *Holmes-Pollock Letters* (1942) Vol. 2, p. 36. In 1917 he stated the same creed as follows: ". . . when men differ in taste as to the kind of world they want the only thing to do is to go to work killing." *Holmes-Laski Letters* (1953), Vol. 1, p. 116.

Justice Holmes wrote those words before the atomic bomb and the hydrogen bomb had made war "a Frankenstein to destroy both sides" . . . which "contains . . . the germs of double suicide," to use the recent words of General Douglas MacArthur.

Weapons of modern war have helped expose the error in the Holmes philosophy. It was always at odds with the ethical concepts of law and justice shared by large segments of the American community.* It was also

*See Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 Fordham L. R. 255; Lucey, *Holmes-Liberal-Humanitarian-Believer in Democracy?* 39 Georgetown L. J. 523.

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always at war with the Gandhian philosophy that the power of the soul could, indeed, be the most potent, positive force in the affairs of men. In the sweep of history, justice is the *ultima ratio*. The power of its ideas survives the hordes of all barbarians, the decrees of all dictators. Jesus of Nazareth proved it by the vitality of the ideas he loosened upon the western world. Buddha did the same in Asia.

B. *Truth Is Not Partisan.*

The accounts from Communist China show a different approach in the search for truth and justice. It is so different that it marks a throwback to the days of the Star Chamber, when judges knew what evidence they needed to convict and sanctioned every procedural device likely to produce the desired results. An insight into modern Chinese methods is given in the chronicles of A. R. MacKenzie, Squadron Leader of the Royal Canadian Air Force, shot down during the Korean war and held in prison by the Chinese for two years. He was, indeed, kept in solitary confinement for 465 days until he broke, confessing, contrary to the facts, that he had been briefed to fly over China, that he was shot down over China, that he was captured in China. MacKenzie relates the Chinese technique:

"One day one of the interpreters gave me a little lesson in Communist dialectics. He explained that truth is partisan, and that what helps the people is the truth.

"In other words, even if I had not been shot down over China and said I had been, this would be the truth because it would help the people propagandawise.

" 'If you tell the imperialistic truth, you hurt the people,' said the interpreter who lectured me on the Communist view of 'truth.'

" 'But if you tell our truth,' he went on, 'that is, the people's truth, you serve the people, and nothing is a greater honor than to serve mankind.' "

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The idea that "truth is partisan" is at war with the concepts of due process that dominate both American and Indian jurisprudence. Those who believe that "truth is partisan" are unworthy of the great traditions of the law.

Those who undertake the search for justice are members of a universal priesthood. The search is world-wide. No race is excluded. We of the West have had our great exponents of truth; we have had judges and lawmakers whose sense of justice was universal, not parochial, whose philosophy was timeless, not tuned to the climate of the day. We of the West have often forgotten that the East has also had great exponents of the same faith. We of the West have sometimes even forgotten that the seeds of our political revolution and the seeds of our ethical revolution came out of Asia.

C. *The Multi-Racial Community.*

America, however, has made her own unique contributions. One is in the manner in which she has built one community and one people out of many races. We have had our share of racial animosities and prejudices. We had the repressive alien and sedition laws, the Native American movement, the Know Nothing Party, the American Protective Association, and the Ku Klux Klan—to mention only a few. But these agencies of intolerance did not gain many adherents; and in the span of our history they were relatively unimportant. We are today one people, with one flag, one political creed, one loyalty.

Emma Lazarus wrote immortal words for our Statue of Liberty:

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tossed to me:
> I lift my lamp beside the golden door.

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That message is not mere sentiment. It represented for years the American political creed and the American international policy. The words of Emma Lazarus stated the American ideal that our continent was to be an asylum for the refugees of the world. That policy basically altered our national character and brought in its wake a host of problems relating to civil rights.

That policy was not always followed. Fear of the great Chinese influx in the West led to a Chinese Exclusion Act in 1882. Efforts to curtail immigration so as to make America less of a political asylum followed. Literacy tests were proposed and laws containing them were passed, only to be vetoed by Cleveland, Taft, and Wilson. Finally one such act was passed over Wilson's veto. There followed, in 1921, a quota system which, in its general outlines, survives today. We did, however, become once more a political asylum during and after World War II, admitting many thousands who were political refugees and displaced persons. Hitler's madness gave us illustrious men and women, including the ~~great~~ Albert Einstein.

So it is that for most of our national existence, we have been an asylum for refugees. The extent of our dependence on immigration for growth and development can be appreciated only when we remember that during the period 1820 to 1948 our population was increased by nearly 39 million immigrants.

Over the years, Europeans made up the great bulk of the new immigrants. But Asians, too, came in large numbers: since 1820, nearly 400,000 Chinese and nearly 300,000 Japanese.

Many aliens who reached these shores were disqualified to become citizens or, though qualified, chose to retain their alien status. But the effect of the Fourteenth Amendment was inexorable and profound. That Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

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United States and of the State wherein they reside." By the dictate of that Amendment, all those born here are citizens, whether their parents were white, black, brown, or yellow; aliens or citizens.

The story of the American melting pot is the story of how peoples of many tongues and many races became one. In America, the new arrivals often lived apart, clinging to their old customs and forming clannish groups in the community. Their work and future were in the United States; but their memories were still abroad; and they lived half-way between the old country and the new.

But the second generation was different. The youngsters were part of the new community that was forming in America. They attended the public schools and learned one history, one language, one loyalty. The public school was the true melting pot; and the public school teacher was the leading architect of the new America that was being fashioned. The races no longer stood apart. They were equals in the classroom. Merit rather than race also set the standard on the athletic field. The laurels went to the best student, whatever his or her race. Race became less and less important, as students were judged on their performance. The notion of equality was more than a declaration of principle; it was a working creed.

This process of assimilation greatly affected the American community. Many of the immigrants went to work at the bottom of our industrial scale, furnishing the manpower for mines, factories, and mills. Soon they were to supply a push at the bottom that was felt at the top. And it was not long until many at the bottom started moving up the ladder.

The language, songs, and folk ways of the newcomers added a new flavor to American communities. Their culture introduced a fascinating diversity. Their attitudes often mellowed the American point of view. Their humor brightened the platform and the stage. Their

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religious diversities brought home the necessity of tolerance for every group in the nation.

These immigrants furnished America with artisans, politicians, scientists, artists, business executives, poets and authors, teachers and judges. As the Danish poet, Adam Dan wrote,

"We came not empty handed here
But brought a rich inheritance." *

And so it was that even when the first generation remained aloof, the second and third did not. The youngsters who came to maturity through our public school system lost their racial identity and became plain Americans, standing on their merits before their fellow men, and winning or losing according to their abilities.

This process of assimilation did not work perfectly. There were instances of prejudice and discrimination. The Negroes were long suffering, perhaps the ones who felt discrimination the most. But over the decades great progress was made, even in their case.

I will discuss later their advances in the public life of America, how in 90 years they have emerged from slavery to positions of distinction. Their victories sometimes were long in coming. But their right to equality of treatment has at last been realized. No minority in any country has progressed so far in the same length of time as the American Negro. Today he sits in our legislatures, on our school boards, on many of the administrative agencies, and on our courts. He is present in every profession and calling; he is an honored member of the American community.

In the case of most of the newcomers, our communities became more and more integrated. As that happened, America gained new strength. The hatreds and suspicions of the Old World largely abated. Every American,

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*Quoted in Morison and Commager, The Growth of the American Republic, vol. II (1950), p. 183.

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whatever his race, or creed, or religion, was part of a new and exciting adventure in living and working together, in building one nation out of some thirty different races. Out of diversity we found a new unity.

The measure of our success is indicated by the situation in Hawaii during World War II. That Pacific outpost wrote a memorable record during the war years. Not one act of sabotage implicated any resident, yellow or Causasian. The Chinese and Japanese who live in Hawaii proved that loyalty has no color line, that the yellow races can be as devoted to freedom as any other people.

Racism in America has not been completely eradicated. It is a sturdy pestilence. Racism and intolerance raise their heads repeatedly, not only in America but in every land. India also has had bitter experiences with intolerance.

India, I gather, does not have quite the same problems of a multi-racial community. But on the Indian subcontinent are peoples of different races and different religions, and peoples of many different tongues, not to mention dialects. The Constitution of India, while promoting the Hindi language (Articles 344 (1) and 351), recognizes in the Eighth Schedule fourteen languages.

India's experience with a multi-racial community extends back many, many years. Under the British regime, minorities were, in a sense, protected, for each one had a separate electorate register from which the particular minority sent its own representatives to the legislature. The system that prevailed under the British in India was comparable to that which obtains today in Lebanon where one district returns only a Druze to Parliament, another, a Moslem, another, a Christian. Under that system the protection sought to be given minorities is through a distribution of seats in the legislature, not through a limitation on the powers of the legislature. An eminent Indian, Sir Benegal Narsing Rau, explained how the electorate register system tended to exaggerate communal differ-

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ences rather than to promote harmony among the several minorities:

". . . it prevented the various communities from developing a sense of political unity rising above race or religion. In other words, it tended to perpetuate the problem of minorities. Half a dozen separate electorate registers for a single legislature, and each member of the legislature owing his allegiance, not to the country as a whole, but to his own particular group in his own community."

Now that India has rid herself of the separate electorate register, she has acquired the capacity to weld many races and groups into one, to make one nation, indivisible, with equality and justice for all. The prospects for success are brightened by reason of the guarantee of Fundamental Right contained in Article 15 (1) of the Constitution—a guarantee which bans discrimination based on religion, race, caste, sex, or place of birth.

The Supreme Court accordingly held in *Das* v. ~~*State*~~, 16 Sup. Ct. Jour. 546, that elections based on separate electorates for members of different religious communities offended Article 15 (1) of the Constitution.

The Supreme Court of India has struck other telling blows at attemps to divide the community among classes based on race, caste, or religion. Thus the State of Madras filled its Engineering School pursuant to a quota system based on religion, race, and caste. For every 14 seats available candidates were selected on the following basis:

Non-Brahmin (Hindus)	6
Backward Hindus	2
Brahmins	2
Harijans	2
Anglo-Indians and Indian Christians	1
Muslims	1

In *Madras* v. *Srinivasan*, 14 Sup. Ct. Jour. 313, an applicant for admission as engineering student was rejected because he was a Brahmin and the Brahmin quota

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was filled. Yet on the merits he stood ahead of non-Brahmins who were admitted. A unanimous Court held the denial of his admission to be unconstitutional in light of Article 29 (2) which provides, "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

The Court struck down a like provision in the Madras law regulating the selection of persons for the judicial service. *Venkataramana* v. *Madras*, 14 Sup. Ct. Jour. 318. Article 16 of the Constitution provides:

"(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

"(2) No citizens shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. . . .

"(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. . . ."

Madras selected the candidates pursuant to a quota system which provided:

Harijans	19
Muslims	5
Christians	6
Backward Hindus	10
Non-Brahmin Hindus	32
Brahmins	11

On the merits, petitioner would have been chosen. But the quota system defeated him. The Supreme Court upheld the quota system insofar as it reserved certain posts for backward classes, as that was deemed permissible under Article 16 (4) of the Constitution. The backward classes were held to include only the Harijans and back-

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ward Hindus. The balance of the quota system was struck down as unconstitutional.

Thus the problems of India are in many ways related to America's. And India's approach is similar to America's.

Rejection of the class conflict is deep in India's philosophy. "The conflict between monied classes and labourers is merely seeming," Gandhi wrote. "When labour is intelligent enough to organize itself and learns to act as one man, it will have the same might as money, if not much greater. The conflict is really between intelligence and unintelligence. Surely it will be folly to keep up such a conflict. Unintelligence must be removed . . . Capital as such is not evil; it is its wrong use that is evil. Capital in some form or other will always be needed."

D. *Government of the People.*

India and the United States both recognize that the people are the basis of all sovereignty. The Preamble of our Constitution reads:

"We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The Preamble of India's Constitution expresses a similar political philosophy:

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, Social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

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IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

Gandhi wrote in 1941, "We have long been accustomed to think that power comes only through Legislative Assemblies. I have regarded this belief as a grave error brought about by inertia or hypnotism. A superficial study of British History has made us think that all power percolates to the people from parliaments. The truth is that power resides in the people and it is entrusted for the time being to those whom they may choose as their representatives."

The United States and India share Abraham Lincoln's theory: government of the people, by the people, for the people.* We both know that the sovereignty of good will is vastly more powerful than the sovereignty of

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*A philosophical restatement of the theory of government of the people, by the people, and for the people was recently made by the distinguished Indian Socialist, J. P. Narayan. Mr. Narayan joined the *bhoodan* movement, the one which has made oustanding progress in obtaining the voluntary distribution of large land holdings among the farmers. He stated the political theory of the *bhoodan* movement as follows:

"It does not aim at capturing the State in order to use it for its ends. As a corollary, it does not wish to create or become a political party in order to capture the State. It aims rather at persuading the people, independently of what the State may or may not want, to carry out a revolution in their own lives, and through that a revolution in society. It aims further at creating those conditions in which the people may manage their affairs directly, without the intermediation of parties and parliaments. Gandhism, like anarchism or communism, visualizes ultimately a Stateless society.

"In the present world the State not only in its totalitarian form but also in its welfare variety is assuming larger and larger powers and responsibilities. The welfare State, in the name of welfare, threatens as much to enslave man to the State as the totalitarian. The people must cry halt to this creeping paralysis. The fact that the welfare State is a creature of the people, in the sense that it is set up by them, does not affect the matter.

"The device of democratic elections cannot equate 500 representa-

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force and coercion. We both provide a universal franchise.

Prime Minister Nehru recently emphasized the importance to India of the concept of sovereignty of goodwill, as contrasted to theory of coercion which dominates Communist China. Speaking of the Chinese, he said:

"They are very keen on changing their economy, and there are no such difficulties as we have, *i. e.*, parliamentary institutions and all kinds of three readings and select committees, all of which take a long time. They can pass a law overnight, if they want to. Nevertheless, they go on saying that it will take them 20 years to lay the socialist basis of their society, to have a socialist economy, in spite of all the speed with which they may work. They go on saying they are not opposed to compulsion. We may say we are opposed to compulsion. They are not. Nevertheless, no country, however strong it may be, can ultimately compel large numbers of people.

"As here, they have got vast numbers of peasants. They can press them, they can carry on propaganda amongst them and they can do everything. In the final

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tives with eighteen crores (counting only the adults) of the people. To the extent the eighteen crores look after their affairs directly, to that extent the powers and functions of the State are restricted and real democracy is practised.

"The experience of communist countries shows that if the immediate steps that are taken are not consistent with the ultimate goal, we may arrive at places that are vastly different from the ultimate destination. Placing before them the great ideal of a Stateless society, the communists set out to do everything through the power of the State. The result was that the State went on acquiring greater and greater powers and in place of the State withering away, there emerged the total State.

"It is for this reason that the bhoodan or Sarvodaya movement insists that if our ultimate aim is to do without the State, we must here and now create those conditions in which the people will rely more and more on themselves and less and less on the State. No one can tell whether the State will ever completely disappear, but if we accept the ideals of a non-violent democracy, we must begin today to work for it."

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analysis, they have to win them over; and they cannot go against widespread wishes of the peasantry there."

What the people have created, the people can change. Therefore, Article V provides for amending the Constitution of the United States. Such amendments may originate in Congress or in a special convention, but in either case they must be ratified by three-fourths of the States. The power of amendment is, however, not unlimited. Article V provides "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The Indian Constitution also provides for amendment, the pertinent provision being Article 368. The amending process has often been used in America. Up to 1955, our Constitution has been amended twenty-two times, the last one restricting the President to two terms.* The Indian Constitution was amended in 1951, the major amendments affecting land reform, free speech, the right to engage in business, and parliamentary procedure.

Neither the American nor Indian political philosophy is doctrinaire. Each looks to practical results more than to slogans or theory. Neither is wholly committed to the welfare state. Both America and India use public and private enterprise to supplement each other, though each with a different emphasis than the other. In America, public enterprise supplements private enterprise in many sectors. There is, for example, the increasing awareness of the responsibility of government for the problems of unemployment. Vast public insurance schemes pertaining to unemployment and old age underlie private enterprise. Moreover, public enterprise—notably the TVA—is sometimes designed to serve as a "yardstick," to use Roosevelt's phrase, for prices charged by private utility companies. The emphasis in India is different, as I have said, for the socialist philosophy is far more widely ac-

*For a review of the history of the amendment restricting the President to two terms, see Willis and Willis, 5 Western Political Quarterly, *The Politics of the Twenty-Second Amendment* 469.

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cepted in India than in America. Yet India's socialism is qualified by a pragmatic approach. Thus Nehru recently said:

"I think it is advantageous for the public sector to have a competitive private sector to keep them up to the mark. The public sector will grow. But I feel that if the private sector is not there, it is abolished completely, there is a risk of the public sector becoming slow—not having that urge and push behind it. It depends on men, of course. On the whole, it is a good thing to have a private sector, something where the surplus energies of people who are not employed in the public sector may have some play, provided, of course, that you control the private sector in the interest of your National Plan. You can control it in a hundred ways. Control it by all means. But where you do not control, give them room to exercise initiative and bring results."

E. *Human Rights.*

The United States has its Bill of Rights,* the name usually given to our first eight Amendments. These include the right to freedom of speech and of press, the right to freedom of religion, the right peaceably to assemble, the right to privacy, the right to jury trial in criminal and in most civil cases, the right to be represented by counsel, the right to be confronted by the opposing witnesses, the right to be free from the compulsion of testifying against one's self, and protection against double jeopardy. Moreover, Article I, Sections 9 and 10 of the Constitution outlaw bills of attainder and *ex post facto* laws. As important to human rights as our Bill of Rights are the Thirteenth, Fourteenth, and Fifteenth Amendments,** adopted at the end of the Civil War, that abolish slavery, outlaw discrimination on account of race, and protect the

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*They are included in Appendix II to Lecture VIII.

**They are included in Appendix III to Lecture VIII.

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right to vote irrespective of race, color, or previous condition of servitude.

The Fundamental Rights in India's Constitution* are the Indian counterpart of these provisions in the American Constitution. India's fundamental rights include freedom of speech and expression, the right to assemble peaceably and without arms, the right to freedom of conscience and freedom of religion, protection against double jeopardy and against *ex post facto* laws, the right to move freely throughout the nation, the right to equality before the law, freedom from discrimination against a citizen on grounds of religion, race, caste, sex, or place of birth. India is on the side of an important aspect of our Fifth Amendment, for she too has a guarantee against self-incrimination in Article 20 (3). And comparable to our Thirteenth Amendment is Article 23 (1) abolishing "traffic in human beings and *begar* and other similar forms of forced labour."

India and the United States share to a large degree a philosophy respecting the relation of the State to the Church. Some 2,000 years ago, Jesus advised, "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's." Luke 20:25. This political philosophy is the root of the present doctrine of separation of Church and State that obtains in the United States. That doctrine found expression in the First Amendment to the United States Constitution.

Separation of Church and State is also reflected in India's basic charter. Article 27 provides, "No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." Article 28 (1) further provides, "No religious instruction shall be provided in any educational institution wholly main-

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*They are included in Appendix IV to Lecture VIII.

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tained out of State funds." As Justice P. N. Sapru said in his Agra University Lectures in 1953, "Our state has no established church. It assures to every citizen freedom to worship God in his own way and observe an attitude of strict neutrality towards all religions in this country."

India's Constitution has innovations not found in the Constitution of the United States. For example, Article 16 (1) provides, "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." Article 24 provides, "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

An even more striking feature of the Indian Constitution, not found in ours, is the provision for preventive detention (Article 22 (A)–(7)), discussed in Lecture VIII.

Another feature of the Indian Constitution which is not found in the United States Constitution is the Directive Principles of State Policy contained in Articles 36 to 51.

These directive principles set forth the economic, social, and political goals of the Indian Constitutional System. For example, Article 38 provides: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." Article 39 states: "The State shall, in particular, direct its policy towards securing—(a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and

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women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that childhood and youth are protected against exploitation and against moral and material abandonment."

Article 45 provides: "The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

As Justice Sapru stated in his Agra University Lectures in 1953, "In these directive principles of state policy will be found the entire philosophy on which the 'welfare state' in any modern community is founded."

Article 37 provides that these principles are not enforceable in any court. It was so held by the High Court of Madras in *In re Thomas*, 40 A. I. R. 21, where an attempt was made to assert a claim based on the provision in Article 46 for promoting the educational interests of the "weaker sections" of the people. Dr. B. R. Ambedkar, however, has observed, "Who should be in power is left to be determined by the people, as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a Court of Law. But he will certainly have to answer for them before the electorate at election time." 7 Const. Assembly Debates 41.

The United States has a Due Process Clause both in the Fifth Amendment governing the federal government and in the Fourteenth Amendment governing the State governments. Each provides that no person shall be deprived of life, liberty, or property "without due process of law."

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There is no Due Process Clause in the Indian Constitution. There are, instead, provisions of the following character:

Article 21. "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 31 (1). "No person shall be deprived of his property save by authority of law."

In *Gopalan* v. *Madras*, 13 Sup. Ct. Jour. 174, the Supreme Court of India rejected a contention that Article 21 was the equivalent of the American Due Process Clause, insofar as *procedural* requirements were concerned. The Court held that Article 21 merely required that the legal procedure validly prescribed by the legislature be followed, and did not embody a concept of natural justice by which the Court was to test *procedural* requirements.

Yet I discern in Indian judicial decisions a flavor of due process when it comes to questions of *substantive* law. One example is *Krishnappa* v. *Bangalore City Bank*, 41 A. I. R. 59, where the High Court of Mysore, in quashing an order declaring that the petitioner could not continue as a member of a cooperative bank, stated:

"However extensive the power of the Government may be considered to be under S. 59 of the Co-operative Societies Act, its orders are liable to be questioned on the ground of want of jurisdiction or failure to apply the principles of natural justice." *Id.*, 62.

There is, also, the leading case of *Harla* v. *Rajasthan*, 14 Sup. Ct. Jour. 735, decided in 1951 by the Supreme Court of India. The case was a criminal prosecution for violation of a law of Jaipur relating to dealings in opium. The Council of Ministers, ruling during the Maharaja's minority, enacted the Opium Act by resolution. The law was not promulgated or published in the Gazette; nor were other measures taken to make the law known to the public. The conviction was accordingly set aside. What

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the court, speaking through Justice Bose, said is reminiscent of American decisions on due process of law:

"Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential." *Id.*, 737.

That decision calls to mind a line of cases in the United States Supreme Court holding laws to be in violation of due process when they are so vague that they provide no ascertainable standard of guilt. One such case is *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, where a law made criminal the making of "any unjust or unreasonable rate or charge in handling or dealing in or with" food supplies that were necessary to life. The standard was held to be too vague to warn men when they were near the prohibited line. And see *Screws* v. *United States*, 325 U. S. 91. As stated in *Winters* v. *New York*, 333 U. S. 507, 515, "Men of common intelligence cannot be required to guess at the meaning of the enactment."

What was written by the Indian Supreme Court in the *Harla* case comports with the philosophy of the American decisions striking down vague statutes as violations of due

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process. Both reflect the repulsive reaction against the practice of the ancient Roman Emperor Caligula who, we are told, "published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it." Suetonius, *Lives of the Twelve Caesars*, p. 278.

While Article 19 (1)(f) of the Indian Constitution guarantees all citizens the right "to acquire, hold and dispose of property," Article 19 (5) gives the government power to impose "reasonable restrictions" on the exercise of that right. We will consider the cases under those Articles in Lecture VIII; and we will see how the Indian Supreme Court sits in judgment on social legislation much as does the United States Supreme Court. Suffice it to say here that the concepts embodied in due process are also embodied in Indian constitutional law, where other clauses do service for due process.

Sarvepalli Radhakrishnan, distinguished scholar and Vice President of India, addressed the United States Senate in 1954 on a memorable occasion. What he said there has enduring values:

"The end of all governments is to give a status of social equality and provide economic opportunity for the common people. We, in our country, are now engaged in the enterprise of effecting a social and economic revolution. The word 'revolution' need not scare us. It does not mean barricades and bloodshed. It means only speedy and drastic changes. We are interested not only in our objectives, but in our methods; not only in what we achieve, but in how we achieve."

Both India and the United States reject the philosophy that the end justifies the means. The vitality of civil rights depends as much on respect for procedure as it does on recognition of substantive rights. Legal history shows, I think, that man's struggle to be free is in large degree a struggle to be free of oppressive procedures—the right to be free from torture, the right to know the charge

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and to have a fair opportunity to defend, the right to have a system of laws that is not a pitfall for the innocent.

F. *Checks and Balances.*

In 1952, Sir Gerald Templer was named High Commissioner of Malaya by the Churchill government. The appointment was made by Sir Winston Churchill at a dinner. After advising Sir Gerald that he was the government's choice, Sir Winston said, "In Malaya, Sir Gerald, all authority will be in your hands. You will have absolute power." After a pause Sir Winston leaned closer and said with great emphasis, "Remember, Sir Gerald, that power is a heady thing."

Power is, indeed, a heady thing—whether it be a King, a President, a Legislature, a Court, or an Administrative agency that is concerned. Power feeds the ego and begets more power. Power is more satisfying to some than wealth. In a monarchical, fascist, or communist regime all power is concentrated in a few hands at the top of the hierarchy. The judicial, legislative, and executive power are all combined. The select few appoint and remove judges, make and repeal laws, and administer the affairs of state.

The struggle of man throughout recorded history has been to be free of that kind of regime. Power being a heady thing should not be absolute. All power needs some restraint, some check, lest it become an instrument of oppression. That is the Indian and American philosophy; and it is reflected in the checks and balances written into the basic law of each.

A basic feature of the American constitutional system is a series of checks and balances by which the three branches of government—Legislative, Executive, and Judicial—serve as restraints one on the other. That is to say, some processes of government are delegated exclusively to one branch; others are made dependent on the concurrence of the Legislative and the Executive;

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and the Judiciary serves at least a limited role in determining whether the other two branches comply with the mandates of the Constitution.

James Madison stated the philosophy behind this system: ". . . the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary." Federalist, No. 51.

Or as James Adams said, "A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two that the efforts in human nature towards tyranny can alone be checked and restrained, and any freedom preserved in the Constitution." *

Contemporary American scholars have recently pointed out how that balance has in certain respects been seriously deranged. Barth, *Government by Investigation* (1955); Lippman, *The Public Philosophy* (1955). We shall find indications, as we proceed, to support the thesis that in some respects the Legislative has been growing in power, especially at the expense of the Executive and to a lesser degree at the expense of the Judiciary. But the system of checks-and-balances still functions as a vital force in American life.

The United States Supreme Court has from the beginning exercised the power to pass on the constitutionality of the action of the coordinate branches of our gov-

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*John Adams to Richard Henry Lee, Nov. 15, 1775, quoted in Alan Barth, Government by Investigation (1955) p. 3.

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ernment. *Marbury* v. *Madison*, 1 Cranch 137. The theory behind this curb on legislative and executive action was explained by James Madison:

"In the United States . . . The People, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws." Report on the Virginia Resolutions, VI Writings of Madison (Ed. Hunt) pp. 386–387.

The judiciary that exercises this power to determine the constitutionality of actions of the other branches of government enjoys independence and insulation from the other branches. All federal judges are granted life tenure; they may be removed only by impeachment; their salaries may not be reduced during their terms. Art. III, Sec. 1.

In these respects, both India and America have much in common, for India, too, has provided an independent Supreme Court to serve as a check on the other branches of government. (Articles 124 *et seq*.)

When we turn to the relation of the Legislative and Executive, a fundamental difference between India and the United States is evident. In the United States, executive power is vested in a President elected for a fixed term of four years (Article II), while legislative power is vested in a popularly elected bicameral Congress. Article I. Since the Executive derives its authority from a popular mandate, rather than from the Legislative, it enjoys a considerable measure of independence and is capable of exercising an independent influence on the Legislative.

Part of this influence is exercised by the veto power contained in Article I, Section 7, which provides that the

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President may refuse to approve any bill passed by the Congress. In case of a veto, a two-thirds vote is required to repass the measure. The mere presence of this power, as well as its exercise, may serve as an important restraint on legislative action.

On the other hand, Congress possesses certain powers to curb the action of the Executive. The basic laws which the Executive enforces must be passed by Congress. The problem of preventing abdication of this law-making function to the Executive by delegation of powers to it has led, as we shall see, to a requirement that the Legislative supply an adequate standard to the agencies which administer the law, so that there is no surrender of the legislative function. Congress also exerts a powerful restraint over the Executive by its control over the national purse strings. In addition, there is the requirement that the major appointments made by the President be confirmed by the Senate. Article II, Section 2. While the President has charge of foreign relations (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304), the treaties made by him must be ratified by a two-thirds vote of the Senate. Article II, Section 2. Moreover, while the President is Commander-in-Chief of our Nation's armed forces (Article II, Section 2), only Congress may declare war. Article I, Section 8.

The importance of these checks-and-balances stems in part, of course, from the fact that Congress is composed of representatives of the various States and districts, while the President represents the Nation at large. Thus, a balance of local and national interests is attained.

In contrast to the American system of independence of the Executive, the Indian Constitution provides for the Parliamentary or Cabinet form of government, in which the legislative and executive branches are, to a considerable extent, intertwined. The Indian Constitution does, of course, provide for a nationally elected President to serve for a fixed term (Articles 52 *et seq.*). But he does

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not serve in an executive capacity.* And it should be noted that, while he may return a bill for reconsideration by Parliament, the repassage of such a measure does not require a special majority.

The position of the Indian President has been described as follows:

"Under [the Indian Constitution] the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the nation." See 7 Const. Assembly Debates 32.

Actual executive power under the Indian system is placed in a Council of Ministers, with a Prime Minister at its head. These ministers are responsible to Parliament and are drawn from that body, as provided in Articles 74 and 75.

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*As Justice P. N. Sapru said in his Agra University Lectures in 1953:

"Our Republic has, as its head, a President elected by all the Lower Houses by the system of proportional representation. Unlike the U. S. A. President, the President is not his own Prime Minister. The Constitution leaves no room for doubt that he is expected to act on the advice of ministers appointed by him on the advice of the Prime Minister. This cabinet is responsible to the Legislature, that is to say, removable by an adverse vote of the Legislature.

"Our founding fathers had no hesitation in accepting the British parliamentary executive as best suited to the genius of our people. We were familiar with its working in provinces where an element of responsibility had been introduced by the Acts of 1919 and 1935. Our study of the American Constitution had taught us that it was difficult to work, for under it there is no such harmony between the executive and legislative organs of the government as marks the British system of responsible government. Experience had further taught us that it was essential for this country to possess homogenous cabinets led by a prime minister at the Centre and chief ministers in the states which would be responsible to popularly elected legislatures deriving authority from an electorate in which it would be open to every adult citizen to participate."

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G. *The Independent Judiciary.*

In America, the tenure of judges of state courts is determined by state law. About three-fourths of our States elect most or all of their judges for fixed terms. Some of the others are appointed by the governors. In our federal system, the judges are nominated by the President and confirmed by the Senate, as provided by Article II, Section 2. They hold their offices "during good behaviour" (Article III, Section 1), which means they serve for life, unless they retire at full salary (as they may do at the age of 65 provided they have served fifteen years, or at the age of 70 provided they have served ten years) or resign. They may be impeached, as provided by Article II, Section 4, by the House of Representatives. If one is impeached, the Senate sits to determine guilt or innocence, the vote of two-thirds of the members of the Senate present being necessary for conviction. Article I, Section 3.

In America's long history, the impeachment power over judges has been sparingly used. Down to 1955, the Senate has sat in only nine cases involving judicial officers. Of these, one resigned, four were acquitted, and four were removed from office.

The American Constitution shows a studied effort to free the Judiciary of control by the other branches of government. Article III, Section 1, of the Constitution provides that federal judges shall "receive for their Services, a Compensation, which shall not be diminished during their continuance in Office." In *Evans* v. *Gore*, 253 U. S. 245, the Court held that this provision rendered unconstitutional the taxation of income of federal judges as part of a taxing measure of general non-discriminatory application.

Later, Congress provided that United States judges appointed after the Revenue Act of 1932 should not enjoy immunity from taxation. Once more, the Court was confronted with the problem. *O'Malley* v. *Woodrough*, 307

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U. S. 277, was a case of a judge who had been appointed to his office after 1932 and had thus been forewarned of the congressional intent to tax his income. The Court upheld the validity of the tax as so imposed, declaring:

"To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1." *Id.*, 282.

The American judiciary early developed a tradition of fearless decisions, regardless of consequences. Moreover, beginning in 1803 in the famous case of *Marbury* v. *Madison*, 1 Cranch 137, the Court announced it would sit to review the constitutionality of Acts of Congress. The theory of judicial review of the constitutionality of federal laws was stated by Chief Justice John Marshall as follows:

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Id.*, 177.

This power of declaring an Act of Congress unconstitutional is sparingly used. If a construction of the Act is possible that will save it from being constitutionally infirm, the Court will adopt that construction. This practice of saving an Act by construing it to avoid the constitutional issue has sometimes been carried a long way.

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Extreme instances of tailoring an Act to make it constitutional can be seen in *United States* v. *Rumely*, 345 U. S. 41, and in *United States* v. *Harriss*, 347 U. S. 612.

The power asserted by the Court is exerted not only over Acts of Congress but over certain Executive actions as well. Thus, when President Truman in 1952 took over the steel mills of the nation in an effort to settle a strike, the mills sought injunctions in the federal courts against the Presidential order. The relief was allowed in the famous case of *Youngstown Co.* v. *Sawyer*, 343 U. S. 579. The President had seized the mills as a result of a labor dispute which threatened steel production, vital to our national defense during the Korean War. The steel companies charged that the seizure was not authorized by any Act of Congress and therefore was invalid. In upholding that contention, the Court stated that the function of the President is to see that the laws are faithfully executed; that the function of Congress is to make the laws. It is to Congress that the legislative power has been entrusted by Article I of the Constitution. "The Founders of this Nation," wrote Justice Black, "entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.*, 589. The seizure was accordingly invalid, since Congress had not authorized it.

The examples of the Court's judicial review are numerous and diverse. Judicial review by the Supreme Court is not only part of the system of checks and balances within the federal system. As I will develop in Lecture II, it also serves an important function in preserving the Union against the tendency of the States to enact laws hostile to the federal scheme.

There are dialectical differences between the statement of the principle of separation of powers in India and in America. See, for example, *Reference Under Article 143 of the Constitution*, 14 Sup. Ct. Jour. 527. But study of the Indian cases shows, as I will illustrate, that a main function of the Indian judiciary is to see that the various

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departments do not trench on the field of the others and that none trenches on the reserved rights of the people.

The Indian courts have a high degree of independence.* The Indian Supreme Court sits in review of the constitutionality of actions of the central and the state governments. Article 32 (1). Separation of the Judiciary from the Executive is stated as a directive principle of state policy. Article 50. Judges serve until they reach a specified age, unless removed for misbehaviour or incapacity. Article 124. In India, as in the United States, salaries of the judges may not be diminished during their term of office. Article 125 (2); Article 221 (2).

Indian ~~courts~~ from the beginning ~~have~~ shown a stout independence. The decision by the High Court of Patna in *Singh* v. *Bihar*, 37 A. I. R. 392, holding unconstitutional certain provisions of the land reform law of the State of Bihar, is familiar history. That decision was, I believe, one of the reasons for the amendment to the Indian Constitution in 1951, adding Articles 31A and 31B. Later, the Supreme Court of India in *Bihar* v. *Singh*, 15 Sup. Ct. Jour. 354, held that the state legislature exceeded its powers to fix compensation, under Item 42 of List III, by a colorable exercise of those powers in creating artificial de-

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*The idea of the Indian Government having within itself a system of checks and balances was Gandhi's from the very beginning. He wrote in 1947:

"Under the British rule the Viceroy could issue ordinances for making laws and executing them. There was a hue and cry against the combination of judicial and executive functions. Nothing has happened since to warrant a change in the opinion. There should be no ordinance rule. Your legislative assemblies should be your only law-makers. Ministers are liable to be changed at will. Their acts should be subject to review by the courts. They should do all in their power to make justice cheap, expeditious and incorruptible. For that purpose *Panchayat Raj* has been suggested. It is not possible for a high court to reach *lakhs* and *lakhs* of people. Only extraordinary situations require emergency legislation. Legislative assemblies, even though the procedure may entail some delay, must not be superseded by the executive."

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ductions which were not really designed to fix compensation but rather to deprive persons of their property without payment of compensation. That decision shows how meticulous the Judiciary has been in measuring laws against the Constitution and striking down any provisions deemed unconstitutional. See also *Deo* v. *Orissa*, 16 Sup. Ct. Jour. 592.

Other instances will be cited in these Lectures. But the foregoing give a measure of the rugged independence of the Indian judiciary. The Indian Supreme Court has been writing on a clear slate, pretty much as did our Court under Chief Justice Marshall. And the precedents it has been establishing indicate that the rights of man have stout champions on the bench.

This attitude is evident not only in cases of high importance involving constitutional rights. It also is present in less spectacular, more mundane cases. I discern from the close scrutiny of records in capital cases a lively solicitude for human rights, an alertness that injustice not be done. *Singh* v. *Madhya Pradesh*, 15 Sup. Ct. Jour. 201, is one illustration. There the Supreme Court of India painstakingly reviewed the evidence in a murder case and reversed a judgment of conviction, overturning concurrent findings of fact of two lower courts.

I have said enough to show that the United States and India have many common starting points in legal and political theory. Many more parallels will become apparent as we explore other areas. Suffice it to say that both legal systems are parts of one stream of the law which has remote sources in Europe, in America, and in Asia.

H. *Problems of Federalism.*

The federal systems of the world, particularly those of Australia, Canada, India, and the United States, have many common problems. It is, I think, no accident that each has a federal form of government. The federal form of government is a practical necessity for continents so vast as these. Each of them is a far-flung empire of States,

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whose towns are remote from the national capital, even under modern methods of transportation. None of these nations can be administered from the federal capital. The distances are too great for efficient oversight and supervision of local administrators by remote department heads.

The diversities among the several States are so great that uniformity in law and custom is difficult, if not impossible. Differences in languages and religion often require distinct local codes and regulations. Some districts are agricultural, others industrial. These differences give rise to diverse problems. The necessities of one region may be unknown experiences to another. One region may be insular in its attitudes, living unto itself, fixed in its attitudes and customs. Another, swept by tides of immigration, may have more cosmopolitan tastes and more liberal, progressive attitudes towards social problems.

England is a small homogeneous society. Australia, Canada, India, and the United States are not. The small towns of America, as well as the large cities, need a large degree of home rule, if matters are to run smoothly and efficiently. The selectmen of an American community, like the *panchayat* of the Indian village, can make more sensible rules governing local affairs than the lawmakers in a faraway capital.

As Justice P. N. Sapru said in his Agra University Lectures in 1953, "Our founding fathers wisely did not establish for this country a completely unitary government in which there was no distribution of sovereignty among the various units composing it. Any such attempt would have completely broken down as India is too vast a country to be governed as a completely unitary state."

Democracy cannot, indeed, flourish with political power concentrated at distant points. Democracy must have healthy roots at the town and village level. If there is to be government of the people, by the people, and for

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the people, the people must be active and alert. They must have education in order to read and understand the issues of the day. They must be politically conscious. They must be active participants in the affairs of state. Certainly in the far-flung domains of America and India, the people cannot be active participants except at a local level.

India's federalism is in some respects different from America's, as we shall see. In India, the central government has all powers not granted the States. In America, the States have all powers not granted the national government. India's Constitution is highly particularized. The Constitution of the United States uses few words and speaks in generalities.

Our Tenth Amendment provides in general terms, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

India's Constitution in the Seventh Schedule, Article 246, has three lists: List I, the Union List; List II, the State List; List III, the Concurrent List.

Foreign affairs, the defense of India, naturalization, coinage of money, interstate trade and commerce, all told 97 entries, are on List I.

Betting and gambling, land reform, wild life, hospitals and dispensaries, intoxicating liquors, public order, all told 66 entries, are on List II.

Criminal law, marriage and divorce, bankruptcy, adulteration of foods, trade unions, electricity, all told 47 entries, are on List III.

The Supremacy Clause of the American Constitution makes the Constitution, and the laws of the United States, and its treaties the supreme law of the land, overriding contrary state laws. Article VI. India's Supremacy Clause makes federal law supersede state law, not only as respects matters covered by the Union List, but also as respects items on the Concurrent List. See Article 254 (1); Article 251.

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Of the differences in the federalism of India and the United States, the most marked relates to the organization of the judiciary. The United States has two systems of courts—the state courts and the federal courts. And the domain of the federal courts is strictly curtailed. India has no dual system. Cases originate in state courts whatever questions may be involved. And the Supreme Court of India has broader powers over them than the Supreme Court of the United States has over our state courts.

Unlike the American Constitution, which envisages both a State and a National citizenship, there "is only one citizenship for the whole of India. It is Indian citizenship. There is no State citizenship." See, 7 Const. Assembly Debates 34.

Moreover, while each State of the United States is free to draft its own constitution covering matters within the competence of the States, that is not true of the Indian Constitution. "The Constitution of the Union and the States is a single frame from which neither can get out and within which they must work." *Id.*

In the United States, the criminal jurisdiction of our state courts does not extend beyond the boundaries of the particular states.

Article IV, Section 2, of our Constitution, however, provides:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

The problems which arise in such cases of interstate rendition are illustrated by the recent case of *Sweeney* v. *Woodall*, 344 U. S. 86. That case involved a fugitive from an Alabama prison, who resisted efforts of that State to secure his return following his arrest in Ohio. He sought relief in the federal court in Ohio, but that court declined to hear his claims. On appeal, the Court of

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Appeals held that the prisoner's claim that he had been submitted to cruel and unusual punishment during his confinement in Alabama, in violation of his constitutional rights, entitled him to a hearing on the merits. A majority of the Supreme Court held that this decision should be reversed. The majority opinion stated:

"The scheme of interstate rendition . . . contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him . . . . Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State." *Id.*, 89–90. See 18 U. S. C. §§ 3182, 3183.

The Indian courts are not faced with such problems. Item 4 of List III of Schedule VII of the Constitution of India provides that there shall be concurrent jurisdiction to legislate regarding removal from one State to another of prisoners, accused persons, and persons subject to preventive detention. Section 82 of the Criminal Procedure Code provides: "A warrant of arrest may be executed at any place in India." *

Moreover, the Emergency Provisions of the Indian Constitution provide for the virtual disappearance of state government while a proclamation of emergency is in operation.

Article 352 gives the President power to make a proclamation that "a grave emergency exists whereby the security of India and of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance." Article 353 provides that, while such a proclamation is in operation, the executive power of the central government supersedes the executive power of the States and Parliament can make laws conferring powers and duties on Union officials respecting matters not on the Union List.

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*As for the extradition of persons taking asylum in India who have committed an offense in British Possessions see *Madras* v. *Menon*, 17 Sup. Ct. Jour. 621.

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Article 356 gives the President broad powers over state governments where he is satisfied that "a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution." * In that event the President can assume the executive powers of the State and declare that its legislative powers shall be exercisable "by or under the authority of Parliament." The judicial power, vested in the High Courts of the States, may not, however, be suspended in whole or in part.

There is no such reservoir of emergency powers in the federal government of the United States. There is, to be sure, the War Power contained in Article I, Section 8. It is a major source of federal power. It is the basis for extensive economic regulation in time of war. That power is sufficiently broad to establish under the federal government extensive regulation of the prices of goods and rentals of housing. See *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *Woods* v. *Miller Co.*, 333 U. S. 138. The War Power has reached into many ordinary affairs of the people, including the construction of factories and dams. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326–330. It has been extended so far as to permit the relocation of certain citizens away from vital defense areas. See *Korematsu* v. *United States*, 323 U. S. 214; *Ex parte Endo*, 323 U. S. 283. It has justified the use of military commissions for certain trials. See *Ex parte Quirin*, 317 U. S. 1. But never has the War Power been conceived to embrace the broad powers of control contained in Articles 352 and 356 of the Indian Constitution.**

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*This was the power exercised to take over the State of Andhra in November 1954. Elections in Andhra were held in 1955 to form a new government. The same procedure had been used earlier in the State of Pepsu in 1953.

**For the very narrow scope of "martial law" under the American Constitution, see *Ex parte Milligan*, 4 Wall. 2; *Sterling* v. *Constantin*, 287 U. S. 378.

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A lesser emergency power is granted to the President by Article 360 of the Indian Constitution when "the financial stability or credit of India or of any part of the territory thereof is threatened." In that event the executive authority of the central government extends to the giving of directions to the State respecting "canons of financial propriety."

The Indian federal system also contains other provisions for administrative control and direction of the States. See Articles 256, 257, and 258.

Article 256 states:

"The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose."

Article 257 provides for the giving of such directions in regard to particular subjects, such as the maintenance and construction of important means of communication, and also as a means of avoiding interference with the Union executive.

Article 258 enables the Union to delegate to the States certain functions in regard to what would normally be Union matters.

Article 249 provides that, upon a two-thirds vote by the Council of States that it is necessary or expedient in the national interest, Parliament may make laws with respect to any specified matters on the State List.

No counterpart of these directive powers is found in the American Constitution. But apart from that dissimilarity and others which I have mentioned, the two federal systems have much in common.

In America, the trend has been toward the development of a strong and powerful national government.* The

* "However much you may deny powers to the Centre, it is difficult to prevent the Centre from becoming strong. Conditions in modern

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impetus for that growth has in part been decisions of the Supreme Court from the time of Chief Justice Marshall to date. ~~The impetus for that growth~~ has in part been the increased use by Congress of the great arsenal of power contained in the Constitution. Powers long neglected, *e. g.*, powers over interstate commerce, have been increasingly used by Congress since the turn of the twentieth century. The increased complexities of American life, the growth of industrialism, the disappearance of the frontier, the increase in population, the growing dependence of one part of the nation on the others—these were all powerful pressures creating the need and demand for federal regulation in fields where previously only the States had legislated. The depression of the 1930's emphasized the need for planning by the central government. The advent of two World Wars made necessary the close integration of the national economy under the National Government. And the war powers of Congress and the President, already mentioned, were ample for that purpose.

The federal income tax which came to us as a result of the Sixteenth Amendment has also given centralization a powerful push. The revenue requirements of the federal government have been so great during the war years and the post-war years that taxes have soared. Today a single person making more than $675 a year and a married couple making more than $1350 a year, pay

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world are such that centralization of powers is inevitable. One has only to consider the growth of the Federal Government in the U. S. A. which, notwithstanding the very limited powers given to it by the Constitution, has out-grown its former self and has overshadowed and eclipsed the State Governments. This is due to modern conditions. The same conditions are sure to operate on the Government of India and nothing that one can do will help to prevent it from being strong. On the other hand, we must resist the tendency to make it stronger. It cannot chew more than it can digest. Its strength must be commensurate with its weight. It would be a folly to make it so strong that it may fall by its own weight." 7 Const. Assembly Debates 42.

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federal income taxes. The tax is a graduated one, increasing in percentage as income increases. Today in America income over two hundred thousand dollars is taxed at the rate of 91 per cent.

Many States also have income taxes; and in that case residents of those States pay income taxes both to the federal and to the state governments. But the federal taxes are so high that state revenues have been increasingly difficult to raise. That has made the States more and more dependent on federal aid—federal aid for highways, federal aid for education, federal aid for slum clearance, and so on. Command by the federal government over the bulk of the financial resources of the nation has made the States more and more dependent—not in the legal or constitutional sense, but in the economic sense. Those who are dependent economically may also become dependent in other ways too. "He who pays the piper calls the tune" is an apt expression for the problems of federalism, as well as for other human relations.

The trend in America toward centralization is accompanied by another marked trend. I refer to the increase in the powers of the Legislative branch at the expense of the Executive. See Lippmann, *The Public Philosophy* (1955). The reasons have been manifold, one of the most important being the enormous increase in public expenditures. The Legislative branch, having control over the purse strings, grew in influence and control with the mounting budgets which it supervised.

India is still too young as a Republic to have experienced many of these developments. But India is launched on vast programs of planning. The blue prints for the new India emanate from Delhi; and they embrace comprehensive programs of reconstruction, rehabilitation, — and industrialization. This central planning may produce in India problems of centralization that parallel America's. If it does, it will affect the measure of federalism actually existing. What is written in the Constitution and in the

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law reports is not always an accurate reflection of the society governed by that legal system.

But as the trend toward centralization continues, the need for safeguarding the rights and opportunities for home rule increases. America cannot be run and managed from Washington, D. C., alone. And if experience is a teacher, India, too, will flourish only if local governments are strong and independent. Gandhi emphasized the importance of local government: "I would say that if the village perishes, India will perish too. India will be no more India. Her mission in the world will get lost." That article of faith was also Thomas Jefferson's.

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TAGORE LECTURES

II

The Judicial Power

A. *Case or Controversy.*

The United States has a dual system of courts—a federal judiciary operating cooperatively with a system of state courts. The federal system derives from the Judiciary Article of the Constitution.

Article III, Section I of the United States Constitution vests "the judicial Power" of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This is the provision that authorized Congress to bring into being the federal system of courts. It is this dual system, which I discuss in the next Lecture, that has given rise to some of our most delicate and perplexing problems of federalism.

Article III, Section 2 of the Constitution defines the judicial power of the federal courts:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens

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of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The judicial power of the state courts is defined by the constitutions and laws of the several States. Since the state courts are creatures of the respective States, they can have such power as their own constitutions and laws provide. Some 10 of the States authorize their courts to render advisory opinions. Thus the Massachusetts Constitution provides, "Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." Second Part, c. III, Art. II, Mass. Constitution of 1919. Illustrative of the exercise of this power is *Opinion of the Justices*, 251 Mass. 569, 147 N. E. 681, where the two houses of the Massachusetts legislature transmitted to the justices a pending bill, designed to secure financial redress in cases of personal injury or death arising out of the operation of motor vehicles. The legislature expressed doubts as to the constitutionality of portions of the proposed law and asked detailed questions, all of which were answered by the court in a full-dress legal opinion.* Such opinions are advisory only. They

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*For other recent illustrations of the advisory opinion in American law, see also *Opinion of the Justices*, at 330 Mass. 713, 113 N. E. 2d 452 (the constitutionality of certain statutory provisions providing for the acquisition of property in connection with the state highway program); *Opinion of the Justices*, 328 Mass. 663, 105 N. E. 2d 225 (self-incrimination as involved in a statute providing for disclosure of

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are given without benefit of oral argument. They are therefore not recognized as binding precedents, in case the same questions are subsequently raised in actual controversies coming before the court. See *Building Inspector* v. *Stoklosa*, 250 Mass. 52, 145 N. E. 262.

Whether these advisory opinions serve an important function in the United States is a debatable issue. There is no doubt that sometimes legislators get proposed legislation referred to the courts for advisory opinions either for delay or in the hope that the judges will declare the bill unconstitutional and thus save the legislators from going on record either for or against the measure. The former purpose is known in the States as a dilatory tactic, the latter as "passing the buck." Yet whatever may be said of the advisory opinion, it is an established institution in a number of States.

India, too, provides for advisory opinions. Article 143 (1) of the Indian Constitution states:

"If at any time it appears to the President that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon."

The importance of the advisory opinion in India's constitutional scheme* may be seen in the momentous decision on the delegation of legislative authority rendered in 1951. *Reference Under Article 143*, 14 Sup. Ct. Jour. 527.

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information contained in tax returns); *Opinion of the Justices*, 147 Me. 25, 83 A. 2d 213 (power of courts to enjoin legislation on horse racing); and *Opinion of the Justices*, 98 N. H. 527, 96 A. 2d 733 (validity of license fees imposed on milk distributors).

*In India the High Courts of the States have jurisdiction to render advisory opinions on income tax matters referred to them by the administrative agency. See *Commissioner* v. *Calcutta Agency Ltd.*, 14 Sup. Ct. Jour. 177.

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The Constitution of the United States does not permit federal courts to render advisory opinions. Article III, Section 2 of the Constitution extends the judicial power only to "cases" or "controversies." And it was early held that this power embraced only actual cases or controversies. In 1793, President Washington caused a letter to be sent by Jefferson, Secretary of State, to the Supreme Court asking whether the President might seek their advice on questions of law arising out of treaties which the United States had entered into with certain foreign nations. The Court refused to entertain the question, pointing out that while Article II of the Constitution expressly grants the President power to call on the heads of departments for opinions, it contains no such provision implicating the judiciary. The Court said that the three departments of government being "in certain respects checks upon each other" and "our being Judges of a Court in the last resort," were "considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to." This decision led the noted historian Charles Warren to say, "By the firm stand thus taken at so early a stage in the career of the new Government, and by declining to express an opinion except in a case duly litigated before it, the Court established itself as a purely judicial body." I The Supreme Court in United States History, 111. See also *Hayburn's Case*, 2 Dall. 409.

The requirement of the Constitution that judicial power be exerted only over "cases" or "controversies" not only precludes the rendering of advisory opinions, but also prohibits judicial decision in any case where the litigation, though in form a "controversy," is in fact only a friendly lawsuit designed to get a ruling from the federal courts.*

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*Under Japan's new Constitution, the Judiciary can pass on the constitutionality of legislation. Article 81. Although the Japanese courts have exercised that power many times in recent years, they

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Muskrat v. *United States*, 219 U. S. 346, is a classic illustration. Cherokee Indians, like other American Indians, are wards of the national government and from time to time have been granted lands by the Congress. These lands were seldom granted outright, but were placed under restrictions and encumbrances to prohibit these wards from squandering their inheritance, and to prevent overreaching persons from getting the property through trickery or fraud. After many of these grants were made, Congress enacted laws increasing the restrictions on lands already granted, and authorizing the Cherokees to sue in the Court of Claims, to determine the constitutionality of those new restrictions.

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insist on actual cases or controversies, in which the issue of constitutionality is presented. That requirement is reflected in a public annnouncement made in 1954 by Chief Justice Kotaro Tanaka:

"The expression: the Supreme court is the constitutional court is merely a popular mode of putting it and from this such conclusions as have been derived by our critics by no means follow. The activity of a court, under the present system, is subject to the concept of administration of justice and system of instances.

"Aside from the question of legislation, under the existing system in Japan, the constitutional court such as exists in West Germany is not recognized. In this, Japan is following the example of the majority of nations. Whether or not we should adopt a system such as West Germany's is a matter that merits careful study.

"Even if it should be decided that we are to adopt it, adequate consideration will have to be given so that no political abuse is engendered by allowing minority parties defeated in Diet balloting to resort to the Supreme Court with the complaint of unconstitutionality, thereby dragging the Supreme Court into the whirlpool of political strife.

"What the new system in Japan differs from the prewar one is that now courts can take up the question of constitutionality in regard to laws and other public acts—in this we have followed the United States model. The United States Federal Supreme Court has the right to decide on constitutionality but this right can be invoked only when concrete controversies arise as to rights and obligations. A case on constitutionality is subject to the system of instances just like any other legal case."

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Muskrat was one of the Cherokees who so sued. The Supreme Court refused to entertain the suit. It pointed out that it did not sit "as a body with revisory power over the action of Congress," but only to determine "actual controversies arising between adverse litigants." *Id.*, 361. Though the United States was the defendant, it had not asserted a claim adverse to the Cherokees. The suit was instigated in advance of any restraint against the Cherokees or their property. "In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question." *Id.*, 362. Under the constitutional scheme, Congress could not require the Court to render judgment in cases wholly anticipatory of any actual injury or damage to the property interests in question.

This principle has had many applications. As notable as any is *Massachusetts* v. *Mellon*, 262 U. S. 447, where a taxpayer sought to enjoin the execution of an Act of Congress, on the ground that it was unconstitutional. The power to pass on the constitutionality of Acts of Congress must be sparingly used, for it involves questions of the greatest delicacy arising between two coordinate departments of the government. "The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, 488.

Keller v. *Potomac Electric Co.*, 261 U. S. 428, is another application of the *Muskrat* principle. The case involved a dispute over valuation in connection with the rate-setting activities of the Public Utilities Commission of the District of Columbia. An Act of Congress provided that the federal courts would play an active role in the rate-setting process and that the Supreme Court should review the lower court's determinations and make the order which the Commission and the lower courts should

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have made. The Court held that portion of the Act providing for Supreme Court review invalid, explaining: "Such legislative or administrative jurisdiction, it is well settled, can not be conferred on this Court either directly or by appeal." *Id.*, 444.

The interest of the plaintiff may be clear but the threatened impact of a law on him so nebulous and remote that the question presented is not justiciable. Such was the situation in *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, challenging the constitutionality of a Kentucky law regulating sellers of leaf tobacco, of whom plaintiff was one. The government of Kentucky had not brought the law to bear on the plaintiff nor threatened to do so. The judicial power, said the Court, does not extend "to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case." *Id.*, 74.

The extent to which the Court has gone in declining jurisdiction is evidenced by *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, where an agency of a State filed suit in a state court to prevent the plaintiff from engaging in interstate transportation of motion picture films. The plaintiff thereupon came into the federal court for an adjudication of his rights. A divided Court refused to entertain the case, since the precise impact of any future judgment of the state court would not be known until the state court acted.

A controversy that is actual, not feigned, that involves a real clash of interests susceptible of judicial determination, may nonetheless become moot. The party against whom an order was sought to be enforced may die; the law on which the complaint rests may be repealed; or other conduct or intervening events may for all practical purposes bring the controversy to an end. The practice in such cases is to reverse or vacate the judgment below and remand the cause with directions to dismiss the complaint on the grounds of mootness. See *United States* v. *Alaska Steamship Co.*, 253 U. S. 113. That order per-

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forms an important service in eliminating from the books a decision rendered on facts presenting no justiciable question and yet which in the future might be invoked to support a plea of *res judicata*.

This does not mean that the voluntary cessation of the challenged conduct deprives the judicial body of the power to determine the case. *United States* v. *W. T. Grant Co.*, 345 U. S. 629. If it did, the wrongdoer could easily escape by using the doctrine of case or controversy for dilatory tactics. As long as there is an actual or threatened invasion of a private or public right, the judicial power to deal with it survives intervening events that do not bring the controversy to a practical end.

Normally, a *habeas corpus* proceeding is rendered moot by the discharge of the prisoner (*Zimmerman* v. *Walker*, 319 U. S. 744) or by the granting of bail while his appeal from denial of the writ is pending. *Johnson* v. *Hoy*, 227 U. S. 245. The reason is that *habeas corpus*, being a means of making judicial inquiry into the cause of restraint of liberty, has no function to serve once the restraint is ended. Of course, if the court discharges the prisoner and the government appeals, the propriety of the exercise of that power may be reviewed against the claim of mootness. *Eagles* v. *United States*, 329 U. S. 304.

Normally, service of a sentence will render the case moot, since there will no longer be a subject matter on which the judgment of the Court can operate. *St. Pierre* v. *United States*, 319 U. S. 41. But a judgment of conviction may have consequences that survive the service of a sentence. Convicted felons often lose civil rights by the law of the state of their residence, *e. g.*, the right to serve on a jury, the right to vote, the right to hold office. If the convicted felon is an alien, the judgment may be the basis of his deportation; or it may stand as a barrier to his naturalization. If further penalties or disabilities can be imposed, then the legal consequences of the judgment of conviction have not been wholly dissipated. In that event the defendant can get his case reviewed on

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the merits and it will not be dismissed as moot, even though he has served the sentence pending appeal. *Fiswick* v. *United States*, 329 U. S. 211. (See also *Amalgamated Assn.* v. *Wisconsin Board*, 340 U. S. 416.)

The principle that academic or moot issues will not be decided appears in Indian decisions also. *Lokanath* v. *Vice-Chancellor*, 39 A. I. R. 198, involved a petition by a student against university officials, alleging he was unlawfully barred from appearing at any examinations. It appeared that the officials took that action against petitioner because they were convinced he had cheated. They did not, however, grant petitioner a hearing before debarring him. While the case was pending before the High Court of Orissa, the University officials agreed to reconsider the case, giving petitioner a hearing. Since that was all the relief the High Court could have given, it dismissed the application.

The principles are clear:

the controversy to be justiciable must not be hypothetical or abstract, academic or moot;

the controversy must touch the legal relations of parties having adverse legal interests;

the controversy must be real and substantial and susceptible of determination by a decree that is conclusive in character.

The application of these principles has produced a body of precedents too vast to treat here. One recent decision touching the area of federal-state relations may be of interest, namely *Doremus* v. *Board of Education*, 342 U. S. 429, which came to the Supreme Court by way of appeal from the New Jersey state courts. It was a suit by parents and taxpayers to have declared invalid a statute of New Jersey which provided for the reading, without comment, of five verses of the Old Testament of the *Bible* at the opening of each public school day. This was said to be a violation of the command of the First Amendment (made applicable, as we shall see in Lecture ~~VI~~ VIII, to

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the States by the Fourteenth Amendment) prohibiting the establishment of religion.

The action was for a declaratory judgment, a cause of action which has become quite popular in the United States during the last generation. Most of the States have authorized that type of action. And Congress has authorized the federal courts to entertain them. It was designed for use in instances where peril and insecurity were imminent, where relief by way of equity might be cumbersome or ineffective, or where it would be better to get anticipatory relief than wait until damages had actually been suffered.

The anticipatory nature of the relief does not, of course, relieve litigants in federal courts from the constitutional requirement that there be a "case" or "controversy." But if there is an actual clash of legal claims, if the controversy is real and substantial, relief by way of declaratory judgment in the federal courts is permissible even though the decree is declaratory only and does not require the award of process or the payment of damages. The leading decision, *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, written by Chief Justice Hughes, so held. It gave the declaratory judgment final and complete approval for use in the federal system.

So the fact that the *Doremus* case involved the use of an action for declaratory relief did not make it uncongenial to the federal system. Moreover, there seemed to be a real, substantial controversy between parents and taxpayers on the one hand and the school board on the other over the use of the *Bible* in the public schools. The parents did not want their children exposed to the teachings of the Old Testament. The taxpayers did not want school facilities, financed by public funds, used on such an educational venture.

The New Jersey courts gave appellants standing to sue. They recognized that a justiciable issue, involving a question of federal law, was presented. But the Supreme Court, by a divided vote, dismissed the appeal. The child

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of the parents involved in the case had graduated from the school before the appeal reached the Court. Hence as to them, the case was moot. And the taxpayers' suit was held to be no "good-faith pocketbook action." *Id.*, 434. Under federal law, as indicated in the earlier discussion of *Massachusetts* v. *Mellon*, 262 U. S. 447, a taxpayer would not have standing to challenge an Act of Congress. The Court carried that principle over into the municipal field. "It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here." *Id.*, 434–435.

The difference between the *Doremus* case and *Massachusetts* v. *Mellon* is of course only one of degree, as are many questions in the law. Certainly it is one thing to deny any taxpayer in the United States standing to contest any Act of Congress, and quite another to give local taxpayers standing to police municipal affairs in the local courts. The *Doremus* case, in denying the local taxpayers standing to contest municipal affairs, is one of the most extreme in the books, as those in dissent felt. For it is plain that if the claim of the taxpayers was correct and the First Amendment was indeed being violated, then the public schools were being deflected from the constitutional project for which the taxes were paid. All of the taxpayers in the town certainly would have standing to sue, for no others would have a greater interest. The fact that the interest of the individual taxpayers was small did not make the suit any the less real, substantial, and vital to the parties.

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Justice Louis D. Brandeis used to say that what the Court did not do was often more important than what it did do. That was his way of emphasizing how important it was for cases to be carefully screened—especially those involving constitutional issues—to make sure that the question was actually and unmistakably presented, that it was really necessary for the Court to make a pronouncement.

There is wisdom in that course. The Court is only one branch of government. The members of the other branches also take an oath to support and defend the Constitution. To pronounce that the other two branches have acted unconstitutionally is a grave and solemn matter. It always is a delicate question, involving relationships whose harmony is essential to the welfare of the nation. The Framers of the Constitution in their wisdom laid down the requirements of a "case" or "controversy" and in so doing limited at once the range and nature of the conflicts coming to the Court. The Court, in strictly construing "case" or "controversy," has been mostly faithful to those requirements and has often protected itself from hasty, ill-advised pronouncements on issues that were not truly ripe for adjudication and that would better be decided on another day. Certainly, the alarms sounded in some of the litigation, which the Court refused to pass upon because no justiciable issues were presented, proved fanciful with the passage of time. New legislation is often disturbing to those who are being subjected to regulation. But the fears that it might be applied in an unfair way are usually not realized. For administrators, like too, have a sense of constitutional duty and a notion of fair play. In America the new laws as actually administered are commonly more moderate than their passage presaged.

In sum, the requirements of "case" or "controversy" have been a healthy influence in American jurisprudence. They have kept the Court from entering the dangerous currents that seem to run now and then in every nation.

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B. *Political Questions.*

In early English history the King's will was law. He appointed the judges who spoke in his stead and on his behalf. He was their source of authority. They sat at his will and often were instruments of his political designs. That was the setting in which the doctrine of sovereign immunity came into the English law. The King could do no wrong, for he was the law. The courts, being his instruments, would entertain no suits or complaints ~~judges, are usually high-minded men and women. They,~~ against him. He was immune from all suits because judges subservient to his will obviously could not entertain them. This doctrine of sovereign immunity became detached from its origins and was adopted by the American courts, though the precise reason for its creation no longer was relevant once America won her independence from England. But it became deeply lodged in American jurisprudence. Beginning in 1855, Congress authorized certain suits against the United States. But not until 1946, when the Tort Claims Act was enacted, was it possible for a citizen to sue the United States for torts committed by government servants.

The relation of the King to the courts helped produce other doctrines that have had a continuing influence in our modern jurisprudence. In 1460 we find the case of *The Duke of York's Claim to the Crown*. The House of Lords was presented with the claim of the Duke to have himself declared the rightful heir to the throne. The Lords, as ordered by the King, asked the King's Justices to assist them. The judges refused to rule, saying they "durst not enter into eny communication therof, for it perteyned to the Lordes of the Kyngs blode." 5 Rotuli Par. L. 375, at 376. By 1793, the principle that courts will not interfere with political questions was firmly established in English law. In that year *Nabob* v. *East India Co.*, 1 Ves. Jr. 371, 2 Ves. Jr. 56, was decided. The Nabob sued the company for breach of contract. The English

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courts refused to entertain the action, saying that the East India Company, in making contracts with foreign potentates, was acting as delegate of the Crown and for its actions could not be held accountable in the courts of law.

The influences behind the development of the law on political, as distinguished from justiciable, questions are numerous. Certainly the fact that the judges were the agents of the King made them reluctant to entertain actions that might thwart his will or embroil them in controversies with the Crown. From that beginning, the roots of the doctrine spread. For various reasons, judges adopted a self-denying policy, keeping hands off many disputes.

There was wisdom in that course. Law is only one instrument for adjusting the conflicts that rage in every society. There are other devices for restoring the balance in society. At the opposite extreme from law is war. There is the revolution that boils from within and casts off the established order. There are also the conflicts between sovereign nations that flare into violence. The domestic courts of a nation are obviously not competent to deal with the issues of war or peace. Those issues belong to the political branches of government.

There are other measures in between law on the one extreme and war on the other that are also beyond the realm of the judiciary. Diplomacy is a useful, time-honored method of settling controversies between nations. Once the dispute coming before the court is seen to lie in that field, judges would act improvidently if they laid hold of it. Lawsuits and diplomatic exchanges are oil and water that do not mix. When a dispute concerns foreign affairs—the relation of one country to another, whether one nation should be recognized, and the like—judges are not competent to act, or, if competent, are likely to do more harm than good in trying to intervene.

On the domestic front too, there are methods of settling controversies without going into the courts. The execu-

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tive and legislative departments have their own procedures and devices. For example, a question may arise whether a Senator or Congressman should be seated in the Congress. Article I, Section 5 of the United States Constitution provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." Hence contests over the seating of rival candidates for the Congress are political, not ~~judiciable,~~ justiciable, under the American Constitution. I note the analogy in the Indian Constitution contained in Article 103, giving the President "final" decision on the question whether a member of the Parliament has become disqualified to serve.

Political action is another method of deciding certain controversies. Not all victories for human rights have been won in the courts. In the Western world, more such victories have probably been won in constitutional conventions or legislative halls than in courts of law. The remedy for unwise, improvident legislation is at the polls. Political action is, indeed, a versatile remedy for the correction of injustices.

Justice Sapru of the High Court of Allahabad put the matter succinctly in the recent case of *Singh* v. *Govind*, 41 A. I. R. 319, 335, a case where the court refused to interfere with the management of the internal affairs of the state legislature. ". . . it is . . . in an assiduous education of the tremendous forces generated by a vast electorate that remedies against real or supposed highhandedness on the part of any particular legislature lies. With all those matters, which are of a political nature, this Court has no concern."

There is the wisdom of the ages in Justice Sapru's dictum. Litigation is not the cure-all, the solution for every conflict. If all our disputes and differences had to go to the courts, we would indeed be bogged down in time-consuming, wasteful procedures. Important as courts are, necessary as law is, litigation serves only a limited

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function. Room must be left for the workings of other conciliatory, mediating, and directive influences.

That is the philosophy behind the modern concept of the political question. Some writers say the refusal of the courts to entertain such actions is due to their desire to avoid raging conflicts or their fear of being embroiled in serious matters of state or their preference for avoiding decisions in particular cases. I think, however, that the real influences involve the usefulness or appropriateness of litigation in settling certain kinds of disputes. They reflect a realization that no judiciary ever can run a nation, that it is but one of several branches of government, that its field is narrowly restricted.

What constitutes a political, as distinguished from a justiciable, question is not susceptible of precise definition. A few illustrations from the American and Indian decisions will help mark the main contours.

After our Civil War, Congress adopted measures against the rebellious States which in retrospect seem most harsh. Contrary to Lincoln's plans, a severe military regime was fastened on the States that had rebelled. Georgia, one of the States affected, brought suit to enjoin the execution of those so-called Reconstruction Acts, claiming that their effect was to overthrow and annul the state government. The Court declined to act, saying that the questions presented were political, not justiciable. *Georgia* v. *Stanton*, 6 Wall. 50.

Luther v. *Borden*, 7 How. 1, is another classic example in American law. It grew out of the Dorr Rebellion in Rhode Island in 1841. The state constitution had provided for a limited suffrage. The people protested but failed to get an amendment to the constitution. But they went forward with mass meetings and agitation, leading to a convention. This convention provided a new constitution and under it a new government was established. But the government installed under the old constitution was in office and refused to be displaced. The matter got into the courts through an action of trespass, arising

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when a representative of the old government broke into the home of a representative of the new, in order to arrest him for unlawful activities in leading the insurrection. The Court refused to entertain the suit, saying that the controversy belonged to the political, not the judicial branch of the government. The Court relied on Article IV, Section 4 of the Constitution which provides, "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." The Court ruled that it was for Congress to determine how this guarantee should be effected.

If two factions send delegates to Congress to be seated as their Senators and Representatives, Congress must determine which ones to seat. ". . . when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." *Id.*, 42.

So, too, as respects the guarantee against domestic violence. The power rests with the Congress, which early in our history had enacted a law giving the President authority to act in such an emergency.

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the

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United States or the government which the President was endeavouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful." *Id.*, 43.

The power of Congress to determine the qualifications of its own members was an issue in *Barry* v. *U. S. ex el. Cunningham*, 279 U. S. 597, where the Court said, "The Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute." *Id.*, 619. This control serves not only to resolve factional disputes arising from election contests as in *Luther* v. *Borden*, 7 How. 1. It also serves as a potential check on other action of the States. *Pacific States Telephone Co.* v. *Oregon*, 223 U. S. 118, illustrates the point.

The initiative and referendum are devices introduced in the United States with the aim of making popular government more effective and responsive. Lobbies or entrenched political cliques may make difficult or impossible the introduction of reform measures. The initiative enables the people to get a measure on the ballot at a general election and to vote it into law. Through the initiative the people go over the heads, so to speak, of the legislators in the state government. The referendum is a device, whereby the people, at a general election, can vote to repeal a law which they think is unfair or unjust. The initiative and referendum came into use in America at the turn of the century and today are in effect in about 20 States.

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In 1902 the State of Oregon adopted the initiative and referendum by amending her constitution. The validity of that amendment was challenged in litigation reaching the Court in the *Pacific States Telephone* case. The Court refused to pass on the question, saying it was a political question. Whether Oregon had been deprived of a republican form of government by the adoption of those measures was for the Congress to determine when it passed on the credentials tendered by Senators and Representatives from Oregon. The Court drew a distinction between "the political questions involved in deciding whether a state government republican in form exists" and the "judicial power and ever-present duty" to enforce the provision of the Constitution "as to each and every exercise of governmental power." *Id.*, 150.

The State of Massachusetts sought to have declared unconstitutional an Act of Congress which provided for an appropriation of funds for the promotion of the health and lives of mothers and infants to be apportioned among the several States accepting the terms of the grant. Massachusetts claimed that this was an attempt by Congress to invade the powers reserved to the States by the Tenth Amendment. The Court refused to entertain the suit, holding it involved only "abstract questions of political power, of sovereignty, of government." *Massachusetts* v. *Mellon*, 262 U. S. 447, 485.

I have already mentioned that Congress and Congress alone has the authority to determine the election contests between rival candidates seeking admission to the Senate or House of Representatives.

Of like import is *In re Ramamoorthi*, 40 A. I. R. 94, from the High Court of Madras, and *Chandra* v. *Governor*, 39 A. I. R. 799, from the High Court of Calcutta, holding that the judicial power does not extend to interference with the nominations of a Governor to a Legislative Council. See Article 361 (1) of the Indian Constitution.

Closer in point is the classic decision of the High Court of Allahabad in *Singh* v. *Govind*, 41 A. I. R. 319, refusing

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The Pocket Veto Case, 279 U.S.655, the Court ruled on

stion whether a bill passed by Congress during a regular session and
ed to the President less than ten days before adjournment of that
, and neither signed nor returned by him, becomes a law. The
eld that it did not, pointing out that the ten days provided
cle I, Section 7, for the President to decide whether to approve
a measure is necessary to proper deliberation and cannot be cut
by Congressional adjournment. And see United States v. Kapsalis,
2d 677."

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to pass judgment on the disciplinary action taken by a Legislative Assembly against a member. The decision gave full effect to Article 194 (3) of the Constitution of India which provides:

"In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution."

". . . this Court," wrote Justice Sapru, "has no jurisdiction to issue a writ, direction or order relating to a matter which affected the internal affairs of the House." *Id.*, 328. Justice Sapru, after reviewing the British law on the power of the House of Commons over its internal affairs, closed his opinion with these words,

"With political remedies this Court is not concerned. Important as they are, they lie beyond our sphere." *Id.*, 335.

And see *Misra* v. *Nandakisore*, 40 A. I. R. 111, from the High Court of Orissa.

There are other legislative matters which, in America, also fall in the realm of political questions.

When a measure passes the Congress, the Speaker of the House and the President of the Senate sign an enrolled bill, which then goes to the President. If he approves the bill, it is placed in the custody of the Secretary of State. It then may not be challenged as not revealing the correct record of what transpired in the Congress. It is conclusive evidence that it was a measure duly enacted into law. *Field* v. *Clark*, 143 U. S. 649.

Under the United States Constitution, amendments may be proposed by two-thirds of both Houses of Congress and become a part of the Constitution "when ratified by the Legislatures of three-fourths of the several States." Article V. *Coleman* v. *Miller*, 307 U. S. 433, involved

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the question whether a state legislature that once rejected an amendment could later ratify it. The Secretary of State is authorized to determine whether the number of States required for adoption of an Amendment have given their assent; and if he finds they have, he certifies that fact. Litigation arose in a state court over whether the state legislature had adopted an amendment. The Supreme Court refused to entertain the question, holding that the matter was left under our Constitution and laws for determination by the political branches. Cf. *Prasad* v. *Union of India*, 14 Sup. Ct. Jour. 775.

I note Article 329 of the Indian Constitution, which provides:

"(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 327 or article 328, shall not be called in question in any court;

"(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

I also note the meticulous care with which the Indian courts read and construe this provision, so as not to bring the judiciary into any of the preliminary phases of election contests, since those phases are in the hands of an Election Commission or Tribunal. See Article 324 of the Indian Constitution; *Ponnuswami* v. *Returning Officer*, 15 Sup. Ct. Jour. 100. Once the Election Tribunal has acted, however, the Supreme Court may review its action under Article 136 (1), which gives that Court discretion to "grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India." This power of review has been held by the Supreme Court of India to extend to the

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Election Tribunal. *Shankar* v. *Singh*, 41 A. I. R. 520; *Krushna* v. *Binod*, 41 A. I. R. 202. And see *Sharma* v. *Chandra*, 17 Sup. Ct. Jour. 717. As we shall see, this power to review, granted by the Indian Constitution, cannot be qualified or taken away by the legislative branch.

In Lecture III, I will develop in some detail the important and significant role played by the American courts in guarding the political processes of the nation. As we shall see, the federal courts have been alert to protect the right to vote, not only against fraud but also against many discriminatory practices. The United States Supreme Court has, however, refused to interfere with certain phases of the electoral process on the ground that the questions presented were political, not justiciable.

Under Article I, Section 2 of the Constitution, the Representatives (who compose the lower House of Congress) are apportioned among the several States "according to their respective Numbers." The enumeration is made every ten years "in such Manner" as the Congress "shall by Law direct." *Id.* Congress has from time to time legislated on the matter, setting standards for the apportionment of the States into Districts, each District electing one Representative to Congress. The apportionments were to be made by the legislatures of the respective States.

In 1946, a case arose in the federal courts of Illinois, challenging the legality of the apportionment in Illinois. It was alleged, for example, that one district had only one Representative, though it was nine times more heavily populated than another district. A closely divided Court held the issue presented was political, not justiciable. *Colegrove* v. *Green*, 328 U. S. 549. The apportionment law was designed to prevent the growth of the "rotten boroughs" so well known in English history. It was clear that if the allegations were proven, the apportionment system adopted by Illinois diluted the votes of

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citizens in the more heavily populated areas, making 100,000 voices in one district as effective for political purposes as 900,000 voices in another district. The constitutional policy of equality of representation was, therefore, defeated. The decision is difficult to sustain under the American system, where, as I have mentioned, the courts have been alert to protect the right to vote against most forms of abuse.

Even more extreme is *South* v. *Peters*, 339 U. S. 276, decided in 1950. The case involved the unit system of voting in Georgia. Under that system, each county was allotted a number of unit votes—the most populous counties, six; the next most populous, four; the rest, two each. The votes of citizens in the most populous county on the average had only a fraction of the weight of those in the other counties. Another closely divided Court refused to entertain a challenge to the unit system, holding the question presented a political, not a justiciable, issue. Yet the discrimination against citizens in the more populous counties of Georgia was plain. Because they were city dwellers their voting power was only an eleventh or a hundred and twentieth of the voting power of other citizens. The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government.

Certainly the Court would strike down a state law which reduced the vote of Negroes, Catholics, or Jews so that each got only one-tenth of a vote. That will, I think, become clear when we turn to the great strides made in policing elections in America and the important role assumed by the courts over the electoral process. Yet if dilution of a vote on racial or religious grounds is a justiciable issue, it is difficult to see why dilution through the unit system is not also in the same category.

The conduct of foreign relations is committed by the United States Constitution to the executive and legisla-

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tive departments.* For example, Article II, Section 2 grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

By Article VI of the Constitution, all treaties made under the authority of the United States are included in the Supremacy Clause. Private rights often flow from treaties. See *Clark* v. *Allen*, 331 U. S. 503. But the question whether a particular treaty has survived a war between the two nations is political in nature. It turns essentially on the policies formulated and adopted by the political departments of the government. The Court sits not to determine independently whether a treaty has survived but to ascertain what the policy of the political departments as respects the survival of treaties has been. *Id.*, 514.

The power to conduct foreign affairs includes, of course, the power to recognize a particular regime as the *de jure* or *de facto* sovereign of another nation. When the political branches of government have spoken, the judiciary is bound. The propriety of that political action is not open to judicial inquiry or decision. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297.

Whether dominion of new territory has been acquired by discovery and occupation, by cession or by conquest

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*In *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, the Court pointed out that the power of the federal government over external affairs was not derived from the States nor from the Constitution alone, but passed directly from the British Crown to the Union at the time of independence as an attribute of sovereignty. Mr. Justice Sutherland, speaking for the Court, stated:

"The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign." *Id.*, 318.

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is also a question for the political departments of government, not for the judiciary. *Jones* v. *United States*, 137 U. S. 202.

Recognition or non-recognition of another nation is a political act that often has repercussions in litigation. So long as the political departments of the United States recognize a foreign government, the courts of the United States will not entertain litigation at war with that policy. Texas broke away from Mexico. While the treaty of amity and friendship with Mexico was still in force, some American citizens entered into a contract which was designed to help Texas finance its revolution. Suit was brought for specific performance of the contract. The bill was dismissed since the contract was in contravention of the policy of the political departments, *Kennett* v. *Chambers*, 14 How. 38.

If the act of recognition of a foreign power includes a policy of providing for the settlement or payment of certain claims, that policy is binding on the judiciary. *United States* v. *Pink*, 315 U. S. 203.

The extent to which our Court has gone in sustaining the policy of the political departments in the conduct of foreign relations is perhaps best illustrated by *Ex parte Peru*, 318 U. S. 578. The Court authorized issuance of a writ of mandamus to discharge a vessel of the Republic of Peru from litigation in the lower federal courts. ". . . the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune." *Id.*, 588.

Both the American and Indian Constitutions, by the very division of powers among the three branches of government, indicate some of the lines between the political question and the justiciable question. Deference to the other departments also makes it necessary or appropriate for the judiciary to stay clear of certain areas of controversy. As I have said, litigation is only one method of

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settling disputes. There are many others; and often they are more effective. But a strong independent judiciary is a great bulwark of the people. If the judiciary bows to expediency and puts questions in the political rather than in the justiciable category merely because they are troublesome or embarrassing or pregnant with great emotion, then the judiciary has become a political instrument itself. Courts sit to determine questions on stormy as well as on calm days. The Constitution is the measure of their duty. And it is the Constitution, not the judges' individual preferences, that marks the line between what is justiciable on the one hand and, on the other, what is political and therefore beyond the reach or competence of courts.

C. *Jurisdiction of the Supreme Court: Appellate and Original.*

The original jurisdiction of the United States Supreme Court, important as it is, makes up only a small fraction of the items on the docket. The great bulk of the cases are under the Court's appellate jurisdiction, as the following table shows.

CASES FILED IN THE UNITED STATES SUPREME COURT

Term	*Original*	*Appeals*	*Certs.*	*Misc.*	*Total*
1944	2	93	1142	—	1237
1945	1	64	1120	131	1316
1946	—	97	1259	154	1510
1947	—	69	647	579	1295
1948	2	86	687	690	1465
1949	—	85	633	552	1270
1950	—	77	582	522	1181
1951	1	104	612	517	1234
1952	2	87	655	539	1283
1953	—	81	603	618	1302

The appeals, certioraris, and miscellaneous cases include those from both the state and the federal courts.

The appeals are those which reach the Supreme Court as of right. Appeal from the United States courts of

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appeals is provided for where an Act of Congress is held unconstitutional in a suit to which the United States is a party (28 U. S. C. § 1252) and where a state statute is held invalid under federal law (28 U. S. C. § 1254 (2)).

Appeal from the United States district courts is provided in cases where a federal statute is held unconstitutional (28 U. S. C. § 1252); where certain types of judgments adverse to the United States are rendered in criminal cases (18 U. S. C. § 3731); where a three-judge district court grants or denies an injunction (28 U. S. C. § 1253); and in certain types of proceedings under particular statutes of Congress, such as the antitrust laws and the Interstate Commerce Act.

Appeals from state courts lie where the court has held a federal treaty or statute invalid, and where a state statute is assailed as invalid under federal law and is upheld. (28 U. S. C. § 1257.)

The certioraris reach the Supreme Court in the exercise of its discretionary jurisdiction, four votes out of nine being necessary to grant a petition.

Review of decisions in the federal courts of appeals may be granted in any civil or criminal case before or after judgment, under the broad grant of jurisdiction conferred by 28 U. S. C. § 1254 (1).

Review of state cases by certiorari is provided for where "the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U. S. C. § 1257 (3).

This provision, like that governing appeals from state courts, is qualified by the statutory requirement that the judgment reviewed be the final judgment of the highest state court in which a decision could be had. The jurisdiction is thus much narrower than that exercised over the

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federal courts of appeals, under the broad statute referred to above.

Some of the principles governing the exercise of certiorari jurisdiction are set forth in Rule 19 of the Supreme Court Rules (effective July 1, 1954):

"The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The basis of the appellate jurisdiction of India's Supreme Court is set forth in detail in Articles 132 *et seq.* of the Constitution. Article 132 provides for appeal from a High Court decision, if the latter certifies that the case "involves a substantial question of law as to the interpretation of this Constitution" or if the Supreme Court grants special leave on this ground in the absence of such a certificate. The appeal may be based on a claim that the question was wrongly decided or, with leave of the Supreme Court, on any other ground. This form of appeal applies to all types of proceedings, civil or criminal.

Review is provided in civil cases where the High Court certifies that the dispute involves a specified monetary amount or that the case is "a fit one for appeal." But

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in the former case, if the High Court has affirmed the decision of the court below, it must also certify that some substantial question of law is involved. Appeals do not lie, however, from the judgment of one judge of a High Court, unless Parliament so provides. Article 133.

Criminal appeals lie where a High Court in a capital case reverses an acquittal or withdraws a case for trial. Such appeals also lie where the High Court certifies that the case is suitable for review, or where additional powers are conferred by Parliament. Article 134.

Articles 138, 139, and 140 authorize Parliament to confer additional powers on the Supreme Court.

Article 136 provides for special leave to appeal which may be granted by the Supreme Court in any case passed on by any court in India, except in matters relating to the armed forces. This provision is somewhat analogous to the discretionary certiorari jurisdiction exercised by the United States Supreme Court.

It should be noted that the role of the High Courts in certifying cases to the Supreme Court is actually a screening device which has no counterpart in America. While the United States Supreme Court has discretionary jurisdiction, it exercises it without the aid of the lower courts.

The appeals in the above chart include those cases in which questions are certified to the Supreme Court by the courts of appeals under 28 U. S. C. § 1254 (3), which provides for review

"By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."

Such jurisdiction is invoked by a court of appeals when it is in doubt as to the proper solution of a question of law. Its exercise has been narrowly construed by the Court in order to retain control over its own docket without having a large number of cases sent up for initial

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decision under the guise of "certification." Justice Cardozo summed up these limitations in *Lowden* v. *Northwestern National Bank*, 298 U. S. 160:

"We will not answer abstract questions unrelated to the pending controversy, or questions unnecessarily general, or questions which admit of one answer in one set of circumstances and a different answer in another, the differentiating circumstances being imperfectly disclosed." *Id.*, 162.

The application of these restrictions is illustrated by *Labor Board* v. *White Swan Co.*, 313 U. S. 23. The questions certified involved the validity of an order of the Board requiring a laundry and dry cleaning company to cease and desist from certain unfair labor practices and to reinstate certain employees with back pay because they had been discharged for their union activities. The certificate was dismissed because the questions did not focus the controversy in its setting. There was no indication of the grounds on which the Board based its jurisdiction; there was no showing of the precise conclusions of the Board or findings on which they were based. The Court pointed out that if the conclusions and findings were indicated in the certificate, it would still be defective as calling for a decision of the whole case. The court of appeals had not presented clear-cut legal questions in their proper setting, which presentation is needed before the Court will exercise its certification jurisdiction.

I have noted above the manner in which the Indian High Courts certify questions to the Supreme Court. But that is after the rendition of judgment by the High Court and wholly unlike the certification procedure in America whereby Courts of Appeal seek to have the Supreme Court decide a question of law as to which the lower court judges are in doubt.

The miscellaneous group in the above chart includes two types of cases. First, there are certain applications for the extraordinary writs, such as habeas corpus, prohibition, mandamus, and common law certiorari. They

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The in forma pauperis cases have comprised about 40 per cent of total number of all cases coming to the Court in recent years.

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are provided for in 28 U. S. C. § 1651, the "All-Writs Statute," which empowers federal courts, including the Supreme Court, to issue all writs necessary or appropriate in aid of their jurisdictions. These writs are, in a sense, original proceedings, though they invoke the appellate, rather than the original, jurisdiction of the Court under Article III, since they are designed to correct errors in lower courts. They are placed on the Miscellaneous Docket, created in 1945, to which *in forma pauperis* petitions were added in 1947.

The *in forma pauperis* cases are filed by petitioners (often though not necessarily prisoners), who do not have sufficient funds to print up the customary papers. By filing an affidavit to that effect, they are enabled to proceed without the costs ordinarily attendant on such litigation. The *in forma pauperis* procedure enables the poorest litigant to seek review in the highest Court in our land.* — Rider 31

All of these (except the few stray originals included statistically in Miscellaneous) come to the Supreme Court pursuant to the provision of Article III, Section 2, already quoted, as follows:

"In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make."

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*The *in forma pauperis* procedure in America is governed by 28 U. S. C. § 1915. I discuss it, together with India's comparable procedure, in Lecture ~~VIII~~. The expenses for the *in forma pauperis* cases coming before the United States Supreme Court are met out of the Special Fund which was established in 1921, and which for the most part is made up of the admission fees paid by lawyers when they become members of the Supreme Court Bar. The United States pays the expense of printing the record in all *in forma pauperis* cases in which review is granted, while the Special Fund is used for the cost of printing briefs and payment of the transportation expense of counsel appointed to represent the indigent litigant. Thus, the *in forma pauperis* litigant is relieved from all of the expenses which would normally be incident to appellate review of his case.

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That is in marked contrast to the Indian Constitution which, I have explained, defines with some particularity the appellate jurisdiction of the Supreme Court. Similarly, the jurisdiction of each High Court is fixed in some detail by the Constitution. Articles 226, 227, 228.

The contrast between the status of the appellate jurisdiction of the Supreme Courts of the two countries is dramatized by *Krushna* v. *Binod*, 41 A. I. R. 202, recently decided by the Supreme Court of India. The legislature had made the orders of an Election Tribunal final and conclusive; and the Tribunal had ruled that the successful candidate was illegally elected because of certain alleged corrupt practices, *viz.* that he was proposed and seconded by government servants. The Supreme Court disagreed with the Tribunal on its construction of the election law, held that the challenged practice was not illegal, and set aside the order of the Tribunal. As noted earlier, Article 136 (1) grants the Supreme Court power to allow an appeal from an order made "by any court or tribunal in the territory of India"; and that power has been held by the Supreme Court to include the power to review orders of an election tribunal. *Shankar* v. *Singh*, 41 A. I. R. 520. In *Krushna* v. *Binod*, the Supreme Court held that this power "cannot be taken away or whittled down by the legislature," that so long as it remains, the discretion of the Supreme Court to allow an appeal and to pass on the merits of the issue presented is "unfettered." *Id.*, 204. Or, as stated in *Mehta* v. *Singh*, 17 Sup. Ct. Jour. 723, 726, "The jurisdiction with which the Election Tribunal is endowed is undoubtedly a special jurisdiction; but once it is held that it is a judicial Tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with elections, the overriding power of this court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any Parliamentary legislation."

In contrast, the appellate jurisdiction of the Supreme Court of the United States is dependent on the Congress.

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The leading case is *Ex parte McCardle*, 7 Wall. 506. McCardle was a newspaper editor in the State of Mississippi during the Civil War. When the war was over and Lincoln was dead, the national government fastened a military regime on the southern States. Lincoln had counseled moderation; but the northerners in control of Congress wanted more extreme measures. The military regime that ruled the South in the post-Civil War years was in many respects an oppressive and unscrupulous one. The injustices of its policies and practices aroused the people and built deep resentments in them. McCardle was one of many to protest; and for his angry editorials he was arrested by the military authorities and held for trial before a military commission.

The idea of a civilian being tried by military authorities is repulsive to the American scheme of justice. A military regime must have certain controls over the civilian population in the theatres of operation. But even then, the military has no jurisdiction to try civilians for offenses in the theatre of operations, if the civil government has not been deposed and civil courts are open and functioning. That was decided in *Ex parte Milligan*, 4 Wall. 2, three years before *McCardle's* case.

So it was doubtful that the military authorities had jurisdiction over McCardle, since hostilities were over and civil courts were available to try civilians. McCardle petitioned the lower federal court for a writ of *habeas corpus*. That court denied the petition and remanded McCardle to military custody. He thereupon appealed to the Supreme Court where a motion to dismiss was filed, the argument being that an appeal did not lie under the *habeas corpus* statute. The Court denied the motion to dismiss, ruling that the statute allowed an appeal. *Ex parte McCardle*, 6 Wall. 318. Thereupon, the case was argued on the merits and taken under advisement. While it was *sub judice*, Congress passed a law over President Andrew Johnson's veto, which law, in terms, deprived the Supreme Court of jurisdiction in such appeals, both

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pending and future. The Court held that Congress had the power to withdraw the appellate jurisdiction of the Supreme Court, even in pending cases. It accordingly dismissed the appeal for want of jurisdiction. *Ex parte McCardle*, 7 Wall. 506.

At no time has Congress withdrawn the power of the Court to review state court decisions involving a construction of the Federal Constitution. That power is, indeed, important to the practical workings of federalism. As Mr. Justice Holmes once said, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end." *Collected Legal Papers*, pp. 295–296.

Congress has changed the appellate jurisdiction of the Supreme Court on numerous occasions. At times, the debates on the question of what this jurisdiction should be have been acrimonious. For example, the First Congress enacted the Judiciary Act of September 24, 1789, Section 25 of which gave the Court power to reverse or affirm cases coming from state courts in which was involved a decision adverse to the validity of an Act of Congress. When in 1821 the Court, speaking through Chief Justice Marshall, upheld the power of Congress to enact that section (*Cohens* v. *Virginia*, 6 Wheat. 264) a political storm broke loose headed by those who viewed with alarm the trend to nationalism.

Spencer Roane, presiding judge of the Virginia Court of Appeals, wrote a series of articles in the *Richmond Enquirer* in which he made a violent attack on the decision. Jefferson, writing in support of that attack, wrote that Roane "pulverized every word that had been delivered by Judge Marshall."

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The leading newspaper of Virginia expressed the outrage of many Virginia citizens and even proposed a state law penalizing any person who enforced any judgments of the Supreme Court in that Commonwealth.

The Governor of Virginia, in a message to the legislature in 1821, referred to the "encroachments of the Supreme Court."

A resolution in the Virginia House of Delegates, calling for a constitutional amendment to prevent review of the validity of state statutes, narrowly failed to pass; and a Virginia Representative introduced a bill in Congress to repeal the 25th Section of the Judiciary Act.

At no time has Congress altered basically or fundamentally the Court's appellate jurisdiction.

The Judiciary Act of 1925* provided for review as of right of opinions in the federal circuit courts of appeal in cases where the validity of a state statute was drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was against its validity. Even in such cases, review was limited to decision of the federal questions presented. In all other cases, review was possible only by certificate or certiorari.

The area of direct review of district court decisions was limited to a few classes of cases: suits by the United States to restrain violations of the anti-trust laws or Interstate Commerce Act; suits to enjoin enforcement of certain orders of the Interstate Commerce Commission or of the Secretary of Agriculture under the Packers and Stockyards Act; suits to enjoin enforcement of state statutes or administrative orders under the three-judge procedure; and government appeals under the Criminal Appeals Act. Such direct review was maintained as a matter of right.

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*For the present codification of these provisions under the Judiciary Act of 1948, see the discussion at the beginning of the present section, *supra*.

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Review of state court decisions as a matter of right was provided for only in cases where the state court held a federal treaty or statute invalid or sustained the validity of a state statute attacked upon federal grounds. Other cases involving federal questions were reviewable by certiorari. It was provided that if review as of right was sought where certiorari was proper, the papers would be treated as a petition for certiorari.

What Congress has done has been to promote the interests of the administration of justice by making the Court's appellate jurisdiction more discretionary, less mandatory. That has been the long-range trend.

Ex parte McCardle, however, remains the law. The power of Congress over the appellate jurisdiction of the Supreme Court is complete. That fact has long troubled many constitutional lawyers. In recent years a movement has been gathering to amend the Constitution, so as to put the appellate jurisdiction of the Supreme Court beyond the reach of Congress "in all cases arising under the Constitution." A proposed constitutional amendment containing that provision is presently before the Congress.

As already noted, the original jurisdiction of the Supreme Court is defined and limited by Article III, Section 2 of the Constitution. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction." Congress has implemented that original Jurisdiction by providing in 28 U. S. C. § 1251:

"(a) The Supreme Court shall have original and exclusive jurisdiction of:

"(1) All controversies between two or more States;

"(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

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"(b) The Supreme Court shall have original but not exclusive jurisdiction of:

"(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

"(2) All controversies between the United States and a State;

"(3) All actions or proceedings by a State against the citizens of another State or against aliens."

It should be noted that the jurisdiction of the United States Supreme Court as set forth in Article III of the Constitution is limited by the provisions of the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

That provision was an outgrowth of the Court's decision in *Chisholm* v. *Georgia*, 2 Dall. 419, where it was held that a State could be sued by an individual without the State's consent, under the grant of judicial power contained in the Constitution. The decision was a great shock to the States. The Eleventh Amendment was quickly proposed and ratified, thus vitiating the effect of the *Chisholm* case.

Unfortunately, the Amendment was not drafted with the precision which might be desired in such an important enactment, and by its express terms it did not prevent a suit by a citizen against his own State. The Court has held, however, that the policy reflected in the Amendment applies to such suits as well as those covered by its express terms. *Hans* v. *Louisiana*, 134 U. S. 1.

Moreover, in *Monaco* v. *Mississippi*, 292 U. S. 313, where a foreign State sought to bring an action in the Supreme Court against the State of Mississippi on certain bonds which had been issued by that State, the Court held that the doctrine of sovereign immunity prevented

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such a suit being brought without the consent of the defendant State.

The basic problem under the Amendment has been to determine when an action is to be regarded as one against a State.

In the case of *In re Ayers*, 123 U. S. 443, the Court held that this question was to be determined by considering the nature of the case and whether the State was the real party against which relief was sought. A suggestion in an earlier case that nominal parties of record were to control was rejected.

In the leading case of *Ex parte Young*, 209 U. S. 123, the Court reexamined the earlier precedents and held that federal courts could, in some circumstances, enjoin a state officer from enforcing a state statute on account of its unconstitutionality. The Court stated: "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, 159, 160. The Court pointed out, however, that "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely mak-

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ing him a party as a representative of the State, and thereby attempting to make the State a party." *Id.*, 157.

The *Young* case has served as a touchstone for much of the litigation in this area.

In the recent case of *Georgia R. Co.* v. *Redwine*, 342 U. S. 299, the Court held that the Eleventh Amendment did not bar a suit to enjoin a state taxing officer from assessing or collecting ad valorem taxes, contrary to an exemption in the charter of the corporate taxpayer and therefore in violation of Article I, Section 10 of the Constitution which prohibits a State from enforcing any law "impairing the Obligation of Contracts." The Court applied the rule of *Ex parte Young* and held that the action was against the tax officer as an individual and was not an unconsented suit against the State.

Judicial construction of the Eleventh Amendment has largely narrowed it to suits which seek to enforce a State's promise to pay or to enjoin state action in a field where no invasion of constitutional rights is claimed. A State must always act through an individual. If the individual, by being charged with unconstitutional action, can be sued individually, the immunity of the State is extremely limited. The state officer is usually not acting beyond his state authority. He speaks and acts for the State, asserting the sovereign power of the State, claiming that the law he enforces is the policy of the State. But the suit can nonetheless be maintained against the state official against the plea of the Eleventh Amendment.

Logic cannot justify the rule of *Ex parte Young*. I have never thought it was in full harmony with the Eleventh Amendment. *Ex parte Young* and its offspring do however, reflect perhaps an even higher policy: the belief that courts must be allowed in the interest of justice to police unruly, lawless government officials who seek to impose oppressive laws on the citizen.

The original jurisdiction of the Supreme Court of India is not unlike that of the United States Supreme Court. Article 131 of the Indian Constitution provides in part:

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"Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

"(a) between the Government of India and one or more States; or

"(b) between the Government of India and any State or States on one side and one or more other States on the other; or

"(c) between two or more States,

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."

In the United States, the most important head of the original jurisdiction of the Supreme Court is that of controversies between two or more States. These disputes are the kind of controversies which sovereign nations customarily handle by diplomacy or failing that, by war. The several States sacrificed some of their sovereignty by joining the Union. The most dramatic illustration is in the submission of their controversies to settlement by the judicial process. In the long vicissitudes of time, world government may evolve and in its evolution develop a like technique for handling major controversies between sovereign nations. The search of man has been for peaceful methods of settling controversies. The progress of civilization has, indeed, been largely measured by his success in that endeavor. Certainly, the application of the process of judicial adjudication to controversies between sovereigns is the most advanced development of law. It deserves, therefore, more than passing attention.

The Court does not sit to hear evidence in these cases. After issue is joined, the Court appoints a Special Master with power to hold hearings, subpoena witnesses, and exercise the other judicial powers necessary for the occasion. The Special Master is usually a distinguished member of the Bar who receives a fee fixed by the Court at the conclusion of the case but who aims to render the service to a large extent as a part of the lawyer's public responsibilities.

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The Special Master, after the hearing, renders his Report; and the case is argued to the Court on exceptions to that Report.

Disputes between States are, of course, an extremely serious matter, and their resolution is not lightly undertaken. We stated in *Colorado* v. *Kansas*, 320 U. S. 383:

"In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved." *Id.*, 393.

The types of dispute which have come before the Court in this area are varied. Boundary disputes are common. *Kansas* v. *Missouri*, 322 U. S. 213, furnishes an illustration. In that case, Kansas sought to have its boundary determined along the Missouri River channel. The boundary of the States was the middle line of the main navigable channel of the Missouri River. It was claimed that the thread of the stream had changed, carrying with it the boundary line. If the change took place by the slow gradual process of accretion, the boundary under American law would move with the shifting channel. If the change was sudden or avulsive, the shifting of the channel would not move the boundary but would leave it where the channel had formerly run.*

The Court heard oral argument on the Special Master's report and concluded that Kansas, the moving party, had not established, by a preponderance of evidence, that the main channel had ever changed to the Missouri side. The

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*See *Lal* v. *Sham*, 14 Sup. Ct. Jour. 307 where the Supreme Court of India allowed the boundary between two villages to be fixed by the channel of a river, even though the channel moved suddenly when the river changed its course.

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disputed land was accordingly awarded to Missouri; and the boundary was definitely fixed. See 322 U. S. 654.

A State may also sue to protect its fiscal interests. *Texas* v. *Florida*, 306 U. S. 398, involved a dispute between several States over death taxes. The dispute arose over rival claims concerning the domicile of the decedent at his death, domicile forming the basis for such taxes. The estate was not sufficient to satisfy all of the demands, and therefore the Court concluded that a real controversy was presented. After examining the evidence, the Court concluded that the decedent was domiciled in Massachusetts.

A State may sue to enforce proprietary rights, as, for example, where the State is injured as the owner of a railroad or other public institution. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. But a State may also sue *parens patriae*. The national government, not the State, represents the citizens as *parens patriae* in their relations to the federal government. But the State stands as *parens patriae* in many matters. The Court, on the complaint of Georgia, enjoined manufacturing companies from discharging noxious gas from their works in Tennessee over Georgia's territory. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. If the health and comfort of the inhabitants of a State are imperiled by the actions of another State or its citizens in garbage disposal or in the discharge of sewage into a river, the complaining State has standing to seek relief in the Supreme Court. *Missouri* v. *Illinois*, 180 U. S. 208; *New York* v. *New Jersey*, 256 U. S. 296; *Wisconsin* v. *Illinois*, 278 U. S. 367. The whole economy of a State may be imperiled by the diversion of water by an upstream State. The State that is injured or threatened may invoke the original jurisdiction of the Supreme Court. *Kansas* v. *Colorado*, 206 U. S. 46; *Wyoming* v. *Colorado*, 259 U. S. 419; *Nebraska* v. *Wyoming*, 325 U. S. 589. A State may have such an interest in, or be so dependent on, the products of another State as to have standing to enjoin the latter from interfering with the

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export of those products from the producing State. The classic example is *Pennsylvania* v. *West Virginia*, 262 U. S. 553, discussed in Lecture V, where Pennsylvania and Ohio were allowed to obtain relief against West Virginia, enjoining her from interfering with the flow of natural gas from her wells to the other States.

A more unique example is *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, where Georgia was granted leave to file a complaint against railroads charged with fastening a discriminatory rate pattern on Georgia, to the injury of her economy.* "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States." *Id.*, 451.

A State may not, however, invoke the original jurisdiction of the Court where it is merely the nominal plaintiff, the real complainants being individual citizens. *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S. 277; *Oklahoma* v. *Cook*, 304 U. S. 387; *Jones* v. *Bowles*, 322 U. S. 707. Moreover, the mere fact that the parties to a dispute are sister States does not mean that the Court will exercise jurisdiction. In *Massachusetts* v. *Missouri*, 308 U. S. 1, the complaining State sought to invoke the Court's jurisdiction to determine which State had the right to impose death taxes on certain property. The Court held that a proper matter for adjudication was not presented, because the assets of the estate were adequate to satisfy both claims. The Court said that the fact that the suit was one to collect taxes from citizens of another State was not enough, pointing out that recourse to the original jurisdiction of the Supreme Court was not needed to protect the interests of the complaining State. Massachusetts, in other words, could sue in the Missouri courts on her claim.

*The case was later dismissed by agreement of the parties, 340 U. S. 889.

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So it is that the Court exercises discretion to prevent an abuse of the opportunity to resort to its original jurisdiction.

Disputes between sister States often involve complex problems which may require years of litigation. *Wyoming* v. *Colorado*, 259 U. S. 419, which continued for nearly 30 years, is illustrative. The action was brought in 1911 to prevent diversion in Colorado of waters of the Laramie River, an interstate stream. Evidence was taken in 1913 and 1914, and put in condensed and narrative form in 1916. The case was argued before the Court three times. In 1922, the Court issued a decree enjoining the diversion of more than a specified amount of water from the river.

In 1932, the Court considered a suit to enforce the 1922 decree, in which Colorado was said to have violated the decree. Colorado was directed to answer the charges of violation. 286 U. S. 494.

In 1936, the Court held that the decree had not been violated, but retained jurisdiction in the event that further Court action were needed. 298 U. S. 573.

Wyoming later claimed that Colorado should be adjudged in contempt for having violated the decree. The Court considered this claim in 1940, and held that the decree had been violated, but that "there was a period of uncertainty and room for misunderstanding which may be considered in extenuation." Therefore, the Court denied the requested adjudication of contempt. 309 U. S. 572.

The water rights cases, of special interest perhaps to the people of India,* often present complex problems that

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*Article 262 of the Indian Constitution provides:

"(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

"(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1)."

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involve not only highly charged emotions but also serious matters of health, comfort, and prosperity. The controversy often requires the weighing of delicate matters. *Kansas* v. *Colorado*, 206 U. S. 46, is in point. That case involved a suit by Kansas to restrain Colorado from diverting the water of the Arkansas River for irrigation of lands in Colorado, thereby preventing the natural flow of that river into Kansas. The Court found that the detriment to Kansas by diminution of the flow of the river was not so great as to make inequitable Colorado's use of water for irrigation purposes, which use was of great benefit to the latter State. Therefore, the suit was dismissed.

Wisconsin v. *Illinois*, 278 U. S. 367 (a water rights case in which Charles Evans Hughes sat as Special Master between his first term on the Court and his designation as Chief Justice), represents one of the most constructive undertakings by the Court in the field of its original jurisdiction. At one time the Chicago River ran into Lake Michigan at Chicago, Illinois. The river was dredged and connected with the Mississippi River. Accordingly, its flow was reversed. The river drew heavily on the waters of Lake Michigan. It drew so heavily that it lowered the levels of Lakes Michigan, Huron, Erie, and Ontario, bringing complaints from the States of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania, and New York. The Chicago River was used to supply water for a canal for navigation. But the City of Chicago also dumped its sewage and industrial waste into the Chicago River, so contaminating it and the Mississippi as to endanger the health of the people downstream. The more it dumped, the more water it needed to wash the sewage down the Chicago River into the Mississippi. The Court entered a decree enjoining diversion of water beyond a stated minimum of cubic feet and according Chicago a reasonably practicable time within which to dispose of its sewage.

That was in 1929. Since that time, the execution of the decree has been under the supervision of successive

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Masters. Industrial plant after industrial plant has adopted means of handling its industrial waste not injurious to health. Sewage plants have been installed. Thus, one of the most complex and perplexing problems of modern civilization—and one that involves great expense and engineering difficulties—has been brought to a successful conclusion under the patient administration of equity.

Equally important and even more involved was *Nebraska* v. *Wyoming*, 325 U. S. 589, which necessitated the apportionment of some of the water of the North Platte River among the States of Colorado, Wyoming, and Nebraska. The problem was a complex of various factors: priority of appropriation of the water rights, physical and climatic conditions bearing on the waste in transporting water long distances, the consumptive use of the water in the several sections of the river, the character and rate of the return flows to the river, the extent of established uses, the availability of storage water to satisfy the needs of particular sections, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation were imposed on upstream use. The decree (325 U. S. 665) enjoined Colorado and Wyoming from diverting water for irrigating more than a specified number of acres in any season or from storing more than specified numbers of acre feet between October 1st of any year and September 30th of the following year. The natural flow of the river between designated points was apportioned between Wyoming and Nebraska—25 percent and 75 percent respectively. A formula was provided in the decree for computing evaporation losses and river carriage losses in determining natural flow and storage rights. The decree was complicated and involved. It requires constant supervision. But it has been in effect a decade and has worked smoothly and efficiently. The alarms sounded when the Court entered the field of writing an engineering decree and specifying in elaborate

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formulae what must be done have proved to be without substance. The economy of this semi-arid region has been greatly stabilized by the decree; and continuous friction between the States competing for the water has been eliminated. The decree has substituted a regulated economy for the uncertainty that previously prevailed.

In the main, the original jurisdiction of the Supreme Court, insofar as controversies between the States are concerned, has been productive of statesmanlike decrees that have solved many complex problems and kept other lesser ones from flaring into unseemly controversies between sovereigns over matters that were susceptible of judicial solution. A close study of the operations of these decrees will show, I think, great progress in a field noted for its delicacy and difficulty.

While the most important exercise of Supreme Court jurisdiction has consisted of resolving disputes between sister States, the Court has also served, on occasion, as arbiter of disputes between the Federal Government and particular States of the Union.

A noted example is *United States* v. *California*, 332 U. S. 19. In that case, the Federal Government sought a decree declaring its rights in certain offshore oil lands as against the State of California. The State had been granting lease rights in the lands in question, which lay off the coast of that State. The Court held that the United States has the paramount rights in the lands in question, since the ocean is of vital importance to the national interest, both commercially and for purposes of national defense, and those interests are primarily the responsibility of the nation, as a whole, rather than of a particular State. "The state," said the Court, "is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks." *Id.*, 35–36.

Like decrees were entered in favor of the United States and against Texas and Louisiana, as respects the oil lying

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under the land which lies seaward of low tide. *United States* v. *Texas*, 339 U. S. 707; *United States* v. *Louisiana*, 339 U. S. 699. The effect of these decrees was, however, vitiated by an Act of Congress, 67 Stat. 29, which ceded the oil rights in these submerged lands to the States from whose shores they extend. This Act was sustained, by a divided Court, as an exercise by Congress of its power under Article IV, Section 3 of the Constitution over property belonging to the United States. *Alabama* v. *Texas*, 347 U. S. 272.

So much for a rough sketch of the jurisdiction of the Supreme Court. Now, a word in conclusion. The Supreme Court is one of the three coordinate branches of the Federal Government. Or more accurately, the Supreme Court heads the Judiciary which together with the Executive and the Legislative makes up the Federal Government. It is an essential part of the system of checks and balances that is basic to our system of government.

Man's long struggle has been to live under ~~laws, not under men.~~ Man's search has been for equal justice under law. ~~That means life under a~~ system of law applicable to all alike, ~~not life under a~~ regime that dispenses justice according to the political or religious ideology of the litigant or the whim or caprice of the government official.

A judiciary dedicated to ~~that task~~ creates confidence in the body politic and a sense of responsibility both in lawmakers and in those who administer the law.

The Indian courts also exemplify that tradition. It is not for me to say whether their decisions are always right. Certainly our own Supreme Court has erred, sometimes grievously. But in the main it has stood high above the storms, administrating justice according to its best lights and regardless of immediate political consequences. As I have already indicated, the United States Supreme Court from the begining undertook to determine whether Acts of Congress were constitutional. *Marbury* v. *Madi-*

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son, 1 Cranch 137. And it has stood ready, in proper cases presenting justiciable issues, to do the same as respects the actions of the Executive, as *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, illustrates.

On the whole, the Supreme Court has written highly responsible treatises on the legal issues coming to it. Today it is one of the great cohesive forces in America. Our people often criticize the Court and disagree with it; but they have a respect and reverence for it, born of decades of experience.

One day in the late forties, while the forces of revolution were tearing China apart and disintegration was taking its toll, a Chinese friend of mine visited Washington, D. C. We toured the city and ended in the courtroom of the Supreme Court. There on friezes are carved some of the great law makers of the world, a goodly number from Asia: Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, Octavian, Justinian, Mohammed, Charlemagne, King John, St. Louis, Hugo Grotius, Blackstone, Marshall, and Napoleon.

My Chinese friend stood silent for a few moments. Then, turning to me, he said, "If only we had a Supreme Court like this, China would be saved."

What he meant was that a Court such as ours was the product of a political maturity that saves a people from disasters. Our government is, indeed, the result of political forces and political processes that allow for change and at the same time give some guaranty of stability. Our Court is an important part of that government—an institution that has created in our people a confidence that the humblest and the most powerful will receive the same treatment.

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TAGORE LECTURES

III

The Dual System of Courts

Introduction.

India and the United States both have a federal court at the apex of their judicial structures. But India follows the precedent of Australia and Canada, in having but one system of courts under a Federal Supreme Court.* The United States could have done the same, for Article III, Section I of the Constitution provides:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Congress, therefore, need not have created any inferior courts. It could have left enforcement of all legal rights, including those arising under the Constitution and laws of the United States, to the state courts, with appellate review by the Supreme Court over any federal question that was raised and presented for decision. To that extent Congress could have planned like Australia, Canada,

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* "The Indian Federation though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law. This is done to eliminate all diversity in all remedial procedure." 7 Const. Assembly Debates 37.

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and India, and had only one federal court at the apex of a system of state courts.

But Congress planned differently, with the result that the United States has had a dual system of courts since the First Judiciary Act of September 24, 1789. So it is that the United States has never been without inferior federal courts. They were the product of the specialized experience after the Revolution and during the years under the Articles of Confederation. During those years there were centrifugal forces at work among the States; sectionalism was rampant; States and regions were jealous of each other; the country was dependent on foreign markets for manufactured articles, as the great bulk of the people were engaged in agriculture. What was needed was the unifying influence of one body of law. And so that need expressed itself in the desire for a new, distinctive system of courts that would be motivated by nationalistic influences. The jealousies among the States, the suspicions and hostilities which the citizens of one State had toward those of another, the prevailing doubts that a Pennsylvania creditor would get justice in a New England court—these created a feeling of insecurity that was not congenial to the mercantile and commercial interests. If the States were to be united as one, if they were to be parts of an harmonious whole, then they must have instruments of government more effective than the old Articles of Confederation. Moreover, if the Federal Government was to pursue its claims against citizens, it should have a court responsive to the needs of the day and not be forced to resort to local tribunals whose prejudices might defeat the national plan.

Many of these influences were stated in the debates on the Constitution. As lucid as any are James Wilson's remarks:

"But when we consider the matter a little further, is it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort?

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I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states? It is true that, under this Constitution, these particular iniquities may be restrained in future; but, sir, there are other ways of avoiding payment of debts. There have been instalment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit.

"Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government." 2 Elliot's Debates 491–492.

The details of the evolution of the federal system of courts have no place here. Suffice it to say that the major landmarks in the evolution of the system were in 1789, 1837, 1863, 1875, 1887, 1891, and 1925. Today the system is made up of District Courts which are courts of general jurisdiction, of Courts of Appeals, and of the Supreme Court. There are 91 District Courts, on which 251 District Judges sit. There are 11 Courts of Appeals, on which 68 judges sit. The Supreme Court has 9 Justices, the number established in 1869 and not since changed.

The federal system also has a series of specialized courts, which in large measure are the product of the growth of administrative tribunals. Since 1855 we have had the Court of Claims, which sits to hear claims against the Federal Government. The Board of General Appraisers, which had been established to hear appeals from decisions of customs collectors, became a specialized court, with the name U. S. Customs Court, in 1926. The Court of Customs Appeals was created in 1909 to handle the great volume of litigation arising out of tariff legislation. It heard appeals from the Board of General Appraisers (later the Customs Court). Then in 1929 the Court of Customs and Patent Appeals was created to hear

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not only the customs litigation but also certain patent cases previously routed to the Court of Appeals of the District of Columbia. We had the Commerce Court from 1910 to 1913, which sat in review of orders of the Interstate Commerce Commission. The present Tax Court grew out of the Board of Tax Appeals, established as an administrative review unit in the Treasury Department in 1924.

The Emergency Court of Appeals was established in 1942 to hear appeals from denials of protests against price and rent control orders during World War II.

There are in addition a veritable host of federal administrative agencies, most of them performing some important judicial functions and practically all of them subject to some degree of judicial review.

A. *The District Courts.*

We are here concerned primarily with the jurisdiction of the inferior courts, the tasks assigned to them by Congress, and their relation to the courts of the States.

I mentioned earlier the scope of the judicial power, as defined in Article III, Section 2 of the Constitution which provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of Admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

These provisions are the fount of all the jurisdiction exercised by the inferior federal courts.

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Congress has established many heads of jurisdiction of the Federal District Courts, the ones starred being made expressly exclusive of the state courts:

1. Civil controversies arising under the Constitution, laws, or treaties of the United States and involving more than $3,000. 28 U. S. C. § 1331.

2. *Civil cases of admiralty or maritime jurisdiction. 28 U. S. C. § 1333.

3. *All matters and proceedings in bankruptcy. 28 U. S. C. § 1334.

4. Suits to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission. 28 U. S. C. § 1336.

5. Civil actions arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. 28 U. S. C. § 1337.

6. *All civil actions arising under any Act of Congress relating to patents, copyrights, and trademarks and of civil actions asserting a claim of unfair competition joined with a substantial and related claim under copyright, patent, or trademark laws. 28 U. S. C. § 1338.

7. Any civil action arising under any Act of Congress relating to the postal service. 28 U. S. C. § 1339.

8. All civil actions (except those under the jurisdiction of the Customs Court) arising under any Act of Congress providing for internal revenue or revenue from imports or tonnage. 28 U. S. C. § 1340.

9. Civil actions for the redress of certain civil rights under the Constitution or Acts of Congress. 28 U. S. C. §§ 1343, 1357.

10. Suits to recover possession of any office (except that of elector of President or Vice-President, United States Senator or Representative, or member of a state legislature) "wherein it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude." 28 U. S. C. § 1344.

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11. Suits brought by the United States or any agency or officer expressly authorized to sue. 28 U. S. C. § 1345.

12. Suits against the United States for the refund of taxes and for the enforcement of other select claims against the United States. 28 U. S. C. § 1346.

13. Actions to partition lands where one tenant in common or joint tenant is the United States. 28 U. S. C. § 1347.

14. Suits by the United States to wind up national banking associations and certain actions brought by national banking associations. 28 U. S. C. § 1348.

15. Suits by or against a corporation created by Congress where the United States owns more than half the capital stock. 28 U. S. C. § 1349.

16. Actions by an alien for a tort, committed in violation of the law of nations or a treaty of the United States. 28 U. S. C. § 1350.

17. *Actions against consuls or vice consuls of foreign states. 28 U. S. C. § 1351.

18. Actions on a bond executed under any law of the United States. 28 U. S. C. § 1352.

19. Actions involving the right of persons of Indian blood or descent to any allotment of land under any Act of Congress or treaty. 28 U. S. C. § 1353.

20. Actions between citizens of the same State claiming lands under grants from different States. 28 U. S. C. § 1354.

21. *Actions to recover fines or penalties incurred under an Act of Congress. 28 U. S. C. § 1355.

22. *Any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction. 28 U. S. C. § 1356.

23. Actions for damages for any injury to the person or property of the claimant on account of any act done by him under any Act of Congress for the protection or collection of the revenues. 28 U. S. C. § 1357.

24. Proceedings to condemn real estate for the use of the United States. 28 U. S. C. § 1358.

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25. There is the famous diversity jurisdiction, set forth in 28 U. S. C. § 1332:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States;

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;

"(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) The word 'States,' as used in this section, includes the Territories and the District of Columbia."

26. There is also the removal procedure—the method by which some cases that are brought in the state courts may be removed on motion of the defendants to the Federal District Court. This procedure is governed by 28 U. S. C. § 1441, which provides:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed

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and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

27. There are, in addition, cases coming to the Federal District Courts from administrative agencies.

The District Courts have jurisdiction of civil actions to enforce, enjoin, or set aside orders of the Interstate Commerce Commission, interlocutory or permanent injunctions restraining enforcement of orders of the Interstate Commerce Commission requiring a hearing by a three-judge court. 28 U. S. C. §§ 1336, 2325. (The three-judge procedure may also be invoked when the Attorney General files an expediting certificate under 49 U. S. C. § 44.)

The District Courts enforce the provisions of the Fair Labor Standards Act, which deals with minimum wages and maximum hours. 29 U. S. C. § 217.

The Public Utility Holding Company Act, 49 Stat. 803, providing for the breaking up of utility empires under the supervision of the Securities and Exchange Commission, permits that agency to resort to the District Courts for assistance in certain instances.

These are the main heads of jurisdiction of the Federal District Courts. The volume of business under the various heads is shown in Table I in the Appendix to this Lecture.

A considerable body of law has developed around these heads of jurisdiction, decisions of such specialized application as to be of no great interest to the Indian Bar and Bench. So I pass them by without more than a reference to a recent treatise that covers the ground, James W. Moore's *Commentary on the U. S. Judicial Code* (1949).

Two, however, deserve special mention. The scope of cases arising under the Constitution and laws of the United States has been carefully circumscribed so as to avoid undue interference with state court systems. In

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the leading case of *Gully* v. *First National Bank*, 299 U. S. 109, an action was brought in a state court to recover certain state taxes due from a national bank, by ~~virtual~~ of certain contractual obligations. The Court held that although a federal statute gave permission for such taxation, that did not change the basis of suit, which was a statute of the State upon which the obligation was based. The mere fact that federal law must be resorted to to determine if such a tax were permissible would not make the cause of action itself one arising out of federal law. "The most one can say is that a question of federal law is lurking in the background . . . ." *Id.*, 117. That, held the Court, is not sufficient. "Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far." *Id.*, 116.

The problem of what constitutes a case arising under federal law is a perennial one. Thus, in *Skelly Oil Co.* v. *Phillips Petrol. Co.*, 339 U. S. 667, rights under certain private contracts turned on whether a federal agency had issued a certificate of public convenience and necessity to a certain party. In order to determine this issue, an action for declaratory relief was brought in a federal court by the obligee under the contracts. The Court held that the case was not one arising under federal law, but was merely an effort to anticipate a possible federal defense, which was not sufficient for federal jurisdiction. The Court stated:

"It would turn into the federal courts a vast current of litigation indubitably arising under State law, in the sense that the right to be vindicated was State-created, if a suit for a declaration of rights could be brought into the federal courts merely because an anticipated defense derived from federal law." *Id.*, 673. And see: *Peyton* v. *Railway Express Agency*, 316 U. S. 350; *Consolidated Freightways* v. *United Truck Lines*, 216 F. 2d 543. As

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stated in *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483, "The federal nature of the right to be established is decisive—not the source of the authority to establish it."

The head of diversity jurisdiction, also, deserves special consideration. It not only looms large in the business of the Federal District Courts. It also throws interesting sidelights on the operation of the dual system of courts.

As indicated by the following table, the diversity jurisdiction accounts for a large percentage of the private litigation in the District Courts.

Year	Private cases	Diversity cases	Year	Private cases	Diversity cases
1945	17,855	5,282	1950	32,193	13,124
1946	22,141	6,273	1951	32,176	13,490
1947	29,122	8,615	1952	35,548	15,135
1948	30,344	10,818	1953	40,120	17,383
1949	31,386	12,347	1954	39,512	18,615

Moreover, as the table reveals, the litigation which comes to the Court under this head of jurisdiction is of an essentially local nature.

The theory behind the diversity jurisdiction is that a citizen of one State, who pursues his claim in the courts of another State against a local resident, is apt not to get the fair, impartial trial to which he is entitled, that local prejudices in favor of the resident and against the outsider will stack the cards against him. An historical survey would indicate, I believe, that there was merit in that view. But as the decades have passed and the United States has become less and less torn by sectional differences, the arguments against diversity jurisdiction have increased. It has been argued, with some persuasion, that there is no longer need for diversity jurisdiction, that a New Yorker can with confidence go into a Georgia court and get full justice, the scales of justice not being at all influenced by the fact that the plaintiff is from the North. Great drives have been made to have the Congress repeal the diversity jurisdiction. The most recent *major* effort to

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abolish the jurisdiction occurred in the early 1930's, when the Senate Judiciary Committee, under the chairmanship of Senator Norris, reported bills for that purpose on two occasions. In the controversy which surrounded these proposals, those who favored abolition of diversity jurisdiction contended:

—there was no longer much, if any, prejudice against non-residents in the state courts.

—litigation in the federal courts is less convenient and more expensive than that in the state courts.

—elimination of diversity jurisdiction would relieve the congestion in the federal courts.

—litigation of state questions should best be left to the state courts.

Those who advocated retention of diversity jurisdiction countered with the following arguments:

—the maintenance of its traditional jurisdiction is essential to the prestige of the federal judiciary; the judiciary should be accommodated to its proper business by improved procedure and additional personnel, ~~rather than accommodating the business to the limits of the judiciary.~~ ;

~~—diversity cases, being provided for in the Constitution, are federal, not state, cases, and are properly cognizable in the federal courts.~~

—the confidence, which diversity jurisdiction inspired, encouraged outside capital to come into States whose courts might have been regarded as prejudiced.

—the jurisdiction does actually serve to avoid dangers of discrimination.

Despite the vigor of the attack, the jurisdiction was preserved and the attempt to abolish it failed.

The attack in the early 1930's was not the first time that diversity jurisdiction was the subject of heated discussion. In fact, the controversy over the jurisdiction began with the establishment of the jurisdiction itself, as

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explained in Charles Warren's article *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, where the author points out:

"There was no part of the Federal jurisdiction which had sustained so strong an attack from the Anti-Federalists, or which had received so weak a defense from the Federalists as that which gave them power over 'controversies' between citizens of different States." *Id.*, 81. It was strongly urged that such disputes should properly be left to the state courts. Those who favored the jurisdiction felt that it was necessary to avoid the local passions and prejudices which might otherwise prevail.

There were various attempts to curtail the jurisdiction in the latter part of the nineteenth century, and at the turn of the century constitutional amendments were proposed with this aim in view. These efforts, too, were unsuccessful.

Criticism of diversity jurisdiction has continued down to the present. In a recent article, Professor Wechsler urges that the federal judiciary's energy should be preserved for vindication of those interests which have become the subject of federal substantive law, rather than being expended on the essentially local matters involved in the diversity cases. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemporary Problems*, 216, 234–240 (1948). But diversity jurisdiction is deeply implanted and likely to occupy a permanent place in the dual system.

It was established at an early date that the exercise of diversity jurisdiction required complete diversity, that is, there could not be any common citizenship on the two sides of a dispute. *Strawbridge* v. *Curtiss*, 3 Cranch 267.

By a series of fictions, a corporation is treated for diversity purposes as a citizen of the State in which it is incorporated. *Muller* v. *Dows*, 94 U. S. 444. A few States are more favorable and lenient toward corporations than others. Hence they attract many corporations

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which go out fully armed as citizens, so far as diversity jurisdiction is concerned, using the facilities of the federal courts to promote their interests.

If diversity of citizenship is present, federal jurisdiction exists, although the subject matter of the dispute involves solely problems of state law. The examples are legion. Thus untold numbers of diversity cases involve no more than automobile accidents presenting only questions of state or local law. The recent case of *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, is another illustration. In that case, a resident of Mississippi brought suit in the Federal District Court in that State against a Delaware corporation to recover damages for libel. The sole basis for federal jurisdiction was diversity of citizenship; and the applicable law of libel was a matter of state, not of federal, law. But on the question of state law the federal court spoke with complete and final authority.

Because diversity jurisdiction involves disputes over matters which, if they arose in state courts, would be disposed of on the basis of the common law rules of the States, the question arose whether, in dealing with such cases, the federal courts should follow the rules of the state law or should attempt to develop a body of "federal common law."

In *Swift* v. *Tyson*, 16 Pet. 1, the Court held that in spite of § 34 of the Judiciary Act of 1789, which provided that state laws should be regarded as rules of decision in common law cases in the federal courts, federal courts were bound to follow state law only on local matters, such as the statutes of the State and their interpretation, and rights and titles to real property. In matters of "general law," such as those governing commercial transactions, the federal courts were free to arrive at their own conclusions.

The rule of *Swift* v. *Tyson* led to many inequities, for a party could often choose whichever forum, state or federal, followed the rules of law most favorable to him. Hence the same case could lead to different results, depending on whether it was tried in a state or federal court.

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It might be that a state law created no presumption that a vote was given for consideration if it lacked a seal, while the federal law treated the absence of a seal as irrelevant, or vice versa. Therefore a plaintiff might get different verdicts depending on which of two courthouses in the same town he entered. More dramatic was *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518. In Kentucky, a contract between a railroad company and a taxi company granting the latter exclusive privileges to solicit patronage at depots was invalid. The federal courts, however, recognized such a contract. A Kentucky corporation had such a contract with a railroad in Kentucky. Realizing that its contract was invalid under Kentucky law but valid under federal law, those individuals who owned the Kentucky corporation incorporated in Tennessee and transferred the assets of the Kentucky corporation to the Tennessee corporation. Thereupon the new Tennessee corporation entered into an exclusive contract with the railroad and shortly thereafter brought suit in the federal courts to enjoin a rival taxicab company from interfering with that contract, basing the jurisdiction of the federal court on diversity of citizenship. The Tennessee corporation won a law suit in the federal court that it was certain to lose in the state court.

Justice Holmes in a classic dissent, joined in by Justice Brandeis and Justice Stone, laid bare the fallacy in the concept that there was a body of "general law" distinct from state law:

"Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within

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it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. . . . But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different. . . . It may be changed by statute, . . . as is done every day. It may be departed from deliberately by judicial decisions, as with regard to water rights, in States where the common law generally prevails. Louisiana is a living proof that it need not be adopted at all. (I do not know whether under the prevailing doctrine we should regard ourselves as authorities upon the general law of Louisiana superior to those trained in the system.) Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide.

"If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. . . . I see no reason why it should have less effect when it speaks by its other voice. . . . If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United

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States to refuse to follow what the State Court decided in that domain. But when the constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States. The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, except when a citizen of another State is able to invoke an exceptional jurisdiction, that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described." *Id.*, 533–535.

Nearly a century after the decision in *Swift* v. *Tyson* had been announced, the Court, in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, expressly overruled that decision in an historic opinion rendered by Justice Brandeis. The Court held that henceforth federal courts in diversity cases would apply the common law rules of the States in which they were sitting. The *Erie* case involved a negligence action in which it had been contended that the law of Pennsylvania, where the accident occurred, was inapplicable because the matter was one of "general law." The Court pointed out that experience in applying the *Swift* doctrine had revealed its defects, and that the hoped-for uniformity which that doctrine had sought had not been achieved. The opinion then stated:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution pur-

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ports to confer such a power upon the federal courts." * *Id.*, 78. Cf. *Kansas* v. *Missouri*, 322 U. S. 213.

The Court has continued to adhere to the rule laid down in the *Tompkins* case. In *Klaxon Co.* v. *Stentor Electric Co.*, 313 U. S. 487, the Court held that the federal courts in diversity cases must follow conflict of law rules prevailing in the States in which they sit. The Court explained:

"Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws . . . . And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." *Id.*, 496–497.

The doctrine has been applied to the problem of allocating the burden of proof. It was so held in *Cities Service Co.* v. *Dunlap*, 308 U. S. 208, involving an issue as to whether a given claimant to land was a bona fide purchaser without notice.

A similar rule was applied to the question of the burden of establishing contributory negligence, which was also held to be determined by the applicable state law on the subject. *Palmer* v. *Hoffman*, 318 U. S. 109.

In *Griffin* v. *McCoach*, 313 U. S. 498, it was held that a state refusal to enforce in its courts a contract insuring the life of an individual in favor of beneficiaries lacking an insurable interest, which refusal was based on grounds of public policy, should be followed by the federal court.

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*While the *Erie* doctrine has become firmly established, the attempt by Justice Brandeis to place the decision on constitutional grounds has been criticized. See the concurring opinion of Justice Reed at 304 U. S. 64, 90; and see: Robert H. Jackson, The Rise and Fall of Swift *v.* Tyson, 24 A. B. A. Journal, 609, 644.

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The federal courts are bound to follow the state statutes of limitations, *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Ragan* v. *Merchants Trans. Co.*, 337 U. S. 530.

In the *York* case, the Court restated the theory of *Erie R. Co.* v. *Tompkins:* "In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Id.*, 109.

Woods v. *Interstate Realty Co.*, 337 U. S. 535, involved an attempt to enforce a contract which was unenforceable in the state courts of Mississippi. The Court held that the federal courts were bound by the local law on this subject:

". . . a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; . . . where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co.* v. *Tompkins* was designed to eliminate." *Id.*, 538. See *Angel* v. *Bullington*, 330 U. S. 183.

A state statute provided that the unsuccessful plaintiff in a shareholder's derivative action would be liable for reasonable expenses of the defense, including attorney's fees, and that the corporation could require the posting of security for the payment of such fees. It was held that the federal court in a diversity case must follow the pro-

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visions of the statute. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541.

The search for what the state law is often presents knotty problems. We have forty-eight States; and these States have great diversities in their legal systems. Most have their roots in the common law. But some, like Louisiana, trace back to the civil law. States with legal systems of common origin have developed local rules for meeting their special needs and so have developed unique chapters in law. Some have developed specialized fields of the law, *e. g.*, oil and gas, water rights, mining. The federal judge who comes from the Bar of the State whose law is involved has presumably a special competence in the subject matter of the dispute.*

But often the judge is at sea in a field that is vast and uncharted for him—a field consisting of municipal ordinances, local practice, and statutes, as well as reported cases. Often the reported cases are not precisely in point. Indeed, the relevant authorities are rarely on all fours, for cases have a way of distinguishing themselves by their special facts. So the federal judge in search of what the state law is often faced with great perplexities. If he could decide what the better rule was and do justice according to his best lights, the task would not be difficult. But where he has to divine what the state law is, he often has to proceed on fragmentary data. The court of last resort in the State has not spoken. There are rulings of intermediate tribunals that squint one way and rulings of other lower courts that squint another. What is the main current of the state law? What would the highest court of the State decide if the question were put to it?

The best guidance the Supreme Court could give was as follows:

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*The Supreme Court pays great deference to the views of the judges of the lower federal courts on these questions of local law. See *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534.

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"An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Trust Co.* v. *Field*, 311 U. S. 169, 177–178.

Yet, that direction, though sound, is hardly comforting to the federal judge in search of an elusive state law question on which large and considerable interests both of property and liberty may rest.

B. *The Courts of Appeal.*

The Courts of Appeal, which came into being by the Act of March 3, 1891, were created to relieve the great volume of work coming to the Supreme Court. Since that time they have become in practice the courts of last resort for the great run of cases in the federal system.

As I have said, there are eleven Courts of Appeals in the United States. Their jurisdiction of cases on appeal from the District Courts is in general as follows:

1. All final decisions of the District Courts are reviewable. 28 U. S. C. § 1291.

2. Some interlocutory orders are reviewable, namely those which:

grant, continue, modify, refuse, or dissolve injunctions, 28 U. S. C. § 1292; or

appoint receivers or refuse to wind up receiverships, 28 U. S. C. § 1292; or

determine rights and liabilities in admiralty cases, 28 U. S. C. § 1292.

Judgments in civil actions for patent infringement which are final except for accounting are also reviewable. 28 U. S. C. § 1292.

The Courts of Appeals also receive large numbers of cases from administrative agencies. The common, though not exclusive, manner of obtaining enforcement of an order of an administrative agency or a review of it by an aggrieved person, is a petition to a Court of Appeals. Illustrative is the review provided in 29 U. S. C. § 160 (e)

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and (f) of orders of the National Labor Relations Board concerning unfair labor practices either of employees or of employers. In these hearings by the Courts of Appeals "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474.

There are like provisions for review of actions of some 15 to 20 other administrative agencies in the Courts of Appeal. The main agencies concerned are:

the Civil Aeronautics Board, 49 U. S. C. § 646;
the Federal Communications Commission, 47 U. S. C. § 402;
the Federal Power Commission, 16 U. S. C. § 825l;
the Federal Trade Commission, 15 U. S. C. § 45c;
and the Securities and Exchange Commission, 15 U. S. C. § 77i.

The work of the Courts of Appeal is shown by the statistics. The inflow of their cases from various sources and the importance of their labors in the field of administrative law are indicated by Tables II and III in the Appendix to this Lecture.

Most of these cases come to the Supreme Court only as a matter of discretion, as the preceding Lecture indicated. Those going on to the Supreme Court *as of right* are only those where an Act of Congress is held unconstitutional in a suit to which the United States is a party (28 U. S. C. § 1252) and where a state statute is held invalid under federal law (28 U. S. C. § 1254 (2)).

Such cases have been very rare. *Ott* v. *Mississippi Barge Line*, 336 U. S. 169, and *McCarroll* v. *Dixie Lines*, 309 U. S. 176, both involving problems of state taxation, are illustrative.

The balance of cases in the Courts of Appeals can reach the Supreme Court only as a matter of discretion. The flow of such cases in recent years is illustrated by the following table:

Petitions for review on writ of certiorari to the Supreme Court of the United States from the United States Courts of Appeals during the fiscal years 1945–54

	Filed	Granted	Denied	Dismissed
1945				
Total	730	150	567	7
Criminal cases	142	34	98	2
United States civil cases	217	59	164	2
Administrative appeals	84	29	52	
All other civil cases	287	28	253	3
1946				
Total	634	125	499	9
Criminal cases	121	21	107	1
United States civil cases	177	41	128	5
Administrative appeals	55	16	40	1
All other civil cases	281	47	224	2
1947				
Total	614	119	535	7
Criminal cases	100	19	89	
United States civil cases	180	42	148	4
Administrative appeals	85	30	56	2
All other civil cases	249	28	242	1
1948				
Total	597	73	496	7
Criminal cases	109	15	91	
United States civil cases	179	27	135	6
Administrative appeals	33	3	35	
All other civil cases	276	28	235	1
1949				
Total	630	104	500	9
Criminal cases	101	13	78	2
United States civil cases	194	41	145	4
Administrative appeals	36	16	22	
All other civil cases	299	34	255	3
1950				
Total	663	67	560	8
Criminal cases	111	11	105	2
United States civil cases	228	35	186	4
Administrative appeals	30	7	16	
All other civil cases	294	14	253	2
1951				
Total	600	76	502	9
Criminal cases	93	10	77	1
United States civil cases	202	37	144	4
Administrative appeals	44	8	38	
All other civil cases	261	21	243	4
1952				
Total	592	90	509	11
Criminal cases	99	9	85	2
United States civil cases	187	50	145	6
Administrative appeals	40	6	27	
All other civil cases	266	25	252	3
1953				
Total	603	89	513	19
Criminal cases	126	19	104	6
United States civil cases	170	26	154	1
Administrative appeals	57	20	45	2
All other cases	250	24	210	10
1954				
Total	592	70	481	12
Criminal cases	121	19	87	3
United States civil cases	179	20	147	2
Administrative appeals	59	10	46	1
All other cases	233	21	201	6

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The above figures illustrate better than any other data the extent to which the Courts of Appeals are the courts of last resort in our federal system.

C. *The Deference Shown the State Courts.*

We have noticed some of the disputes and controversies that have raged over the power of the Supreme Court to review state court decisions and the propriety of the grant of that appellate jurisdiction to the Supreme Court.

The right of Congress to grant the Supreme Court power to review state court decisions was established at an early date. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264. The power granted by the First Judiciary Act has never been withdrawn; and as we have seen, its continued existence is vital to the harmonious functioning of the Union. As Chief Justice Hughes once wrote, "It is evident that without the power to maintain the supremacy of the Federal Constitution over State legislation the Constitution would have been a dead letter in some of its most important applications." *The Supreme Court of the United States*, p. 84.

One view, early rejected, was that once the Supreme Court had a state case for review, the Court could and should decide the whole case, all questions of state law as well as those of federal law.

That position is not novel. The High Court of Australia, under Article 73 of the Australian Constitution, has the final word on all questions in the cases coming to it. The Supreme Court of India does not limit its review to "federal questions," but also passes on matters which our Court would regard as non-reviewable "state questions." * *Singh* v. *Singh*, 41 A. I. R. 579, is illustra-

*Thus, the Supreme Court of India not only construes the Constitution of India and the laws enacted by the central government. It also has the ultimate say on questions of local law as for example the construction of a will (*Ammal* v. *Ayyar*, 14 Sup. Ct. Jour. 171); title to land (*Jha* v. *Singh*, 14 Sup. Ct. Jour. 252); the making of a contract (*MacPherson* v. *Appanna*, 14 Sup. Ct. Jour. 257); the fore-

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tive of this difference in approach. That case involved a dispute over heirship in certain property. In resolving the controversy, the Supreme Court considered the applicable Punjab custom and determined the rights of the parties in the light thereof. The Court then discussed the question whether a gift of the property operated to accelerate the succession and determined that it did. In reviewing these matters, the Court was passing on what the United States Supreme Court would regard as non-federal questions beyond the scope of review, even if presented in a case involving other questions within the Court's competence.

The Supreme Court of India exercises a broad power of supervision over cases from the state courts, as *Hussein* v. *Bombay*, 16 Sup. Ct. Jour. 338 illustrates. The Court in that case entered a judgment of acquittal after two state courts had found no error in the judgment.* As *Singh* v. *Uttar Pradesh*, 17 Sup. Ct. Jour. 570, holds, the closure of a mortgage (*Mahton* v. *Prasad*, 14 Sup. Ct. Jour. 768); determination of whether for inheritance purposes a family is joint (*Sah* v. *Kerr*, 15 Sup. Ct. Jour. 115); maintenance of an illegitimate son (*Kumar* v. *Rao*, 15 Sup. Ct. Jour. 507); corporation law (*Sithayya* v. *Raju*, 13 Sup. Ct. Jour. 120; state statutory law (*Banking Corp.* v. *Shauna*, 13 Sup. Ct. Jour. 171; *Poonja & Co.* v. *Parekh*, 13 Sup. Ct. Jour. 311).

*The trial judge had charged the jury:

"After weighing the probabilities of the case, the evidence on record, as prudent men if you come to the conclusion that the story given by the prosecution does not appear to be probable and that *the accused must not have committed the offence*, then in that case you have to return a verdict of not guilty."

This was held to be reversible error. The Supreme Court said: ". . . the Judge gave the jury a *carte blanche* to come to its conclusion on the basis of its own conjectures, if necessary. Not only that. He told the jury to hold the accused not guilty in case it found it improbable that he must not have committed the offence. These propositions placed before the jury are repugnant to all notions of criminal jurisprudence and they must necessarily have affected its mind in arriving at the conclusion." *Id.*, 341.

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Supreme Court of India has general powers of judicial superintendence over all the courts of India and is "the ultimate interpreter and guardian of the Constitution." * *Id.*, 571.

A contemporary student of the American Constitution argues that it was intended for the United States Supreme Court to exercise as broad a power. Professor William Crosskey, in *Politics and the Constitution* (1953) states that that was the intent of the Framers of the Constitution. He contends:

"that it would be for the common good to introduce order and uniformity into the country's law, there can surely be no question. . . . It is true, the best means for attaining these ends, in many areas of the law, would be by Congressional enactment of complete, nation-wide regulatory statutes. But however active Congress may be, in the future, in the exercise of its just Constitutional powers, there will certainly always be some things governed by the Common Law, and others as to which national legislation will be lacking, but upon which various of our states will have enacted uniform statutes. The use of its powers to keep such state laws uniform, as the legislatures intend them to be, is the Supreme Court's plain right and duty; and it is, also, its right and duty, to promote uniformity in the Common Law. To act for such ends as these would be a constructive task . . . ." *Id.*, 935.

~~From the beginning, the~~ Supreme Court has taken the other view. In *Murdock* v. *Memphis*, 20 Wall. 590, the argument was made that by virtue of the fact that Congress, in determining the provisions which govern review of state court decisions, had omitted an express limitation

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*In *Khan* v. *Hyderabad*, 17 Sup. Ct. Jour. 655, the Supreme Court reduced the penalty for murder from capital punishment to life imprisonment where the judges of the High Court had divided on the question of guilt.

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of the scope of such review, it had thereby authorized a decision of the entire case. The Court held that the amendment of the statute was not intended to broaden the scope of review beyond decision of federal questions in cases coming from the state courts.

"No . . . reason nor any necessity exists for the decision by this court of other questions in those cases. The jurisdiction has been exercised for nearly a century without serious inconvenience to the due administration of justice. The State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly." *Id.*, 626.

This position and the corollary ruling in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, discussed above, are perhaps the most positive expressions of federalism we have. They are posited on the ground that the States are supreme in their fields, that apart from restrictions which the Federal Constitution places upon them, they are free to adopt such policies, such economies, and such rules of law as they choose.

The Court has developed a corollary doctrine as respects cases coming from a state court, a further reflection of the Court's hesitancy to invade what it regards as the province of the state courts in our federal system. I refer to the principle that the Court will not review a decision of a state court if that decision rests on a non-federal ground adequate to support it.

The operation of the principle is illustrated by *Fox Film Corp.* v. *Muller*, 296 U. S. 207. In that case, an action was brought in a Minnesota state court to recover damages for an alleged breach of contract arising out of licensing of the exhibition of motion picture films. One portion of the contracts involved had previously been held to be invalid. The state courts held that recovery

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was barred on two grounds: first, the invalid portion of the contracts was so connected with the remaining portions that the entire contract was tainted; and secondly, that the contract violated the Sherman Anti-Trust Act, a federal statute. The Court dismissed the writ of certiorari which had been granted for lack of jurisdiction, declaring:

". . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. . . .

"Whether the provisions of a contract are non-severable, so that if one be held invalid the others must fall with it, is clearly a question of general and not of federal law. The invalidity of the arbitration clause which the present contracts embody is conceded. . . . In that situation, the primary question to be determined by the court below was whether the concededly invalid clause was separable from the other provisions of the contract. The ruling of the state supreme court that it was not, is sufficient to conclude the case without regard to the determination . . . in respect of the federal question. It follows that the non-federal ground is adequate to sustain the judgment." *Id.*, 210. Other cases illustrating this principle are almost legion.

The principle has other analogies, reflected by *Herb* v. *Pitcairn*, 324 U. S. 117, and *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

The *Pitcairn* case involved actions under the Federal Employers' Liability Act, which regulates liability of common carriers by railroad for negligent injury to their employees. It was not clear whether the state court had rested its decision on certain jurisdictional and procedural provisions of state law, or had ruled on the federal question, *viz.* that the action was barred by the federal statute

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of limitations. The Court, therefore, decided to hold the case pending application to the state court for clarification or amendment.

The *National Tea* case involved a Minnesota chain store tax which included a tax on gross sales, graduated according to the volume of those sales. The state supreme court discussed both the Equal Protection Clause of the Fourteenth Amendment, which presented serious problems, and a provision of the state constitution requiring tax uniformity. It was not clear whether the latter point was intended as an independent state ground, because the court's discussion of that point was intertwined with its discussion of the applicable federal law. Therefore, the Court vacated the judgment of the state supreme court and remanded the cause to that court for further proceedings, so that the federal question might be dissected out or the state and federal questions clearly separated.

In *State Tax Commission* v. *Van Cott*, 306 U. S. 511, a state court held the salaries of employees of certain federal agencies exempt from state taxation. The state court relied on former cases which had held such salary immune from state taxation by virtue of the Federal Constitution. The doctrine of those cases had subsequently been repudiated by the Court (see *Graves* v. *New York*, 306 U. S. 466) at about the time that the Supreme Court was passing on the *Van Cott* case. Therefore, in *Van Cott*, the Court vacated the judgment of the state court and remanded the case to that court for further proceedings unencumbered by the overruled federal doctrine.

At times, the grounds upon which a state court decision rests may be uncertain. The case may have been decided without an opinion. In that situation it is often impossible to determine whether a federal question has been presented and passed upon. As a consequence, the practice developed of having the state court furnish a certificate that would resolve an otherwise ambiguous situation.

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For example, in *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, an action on a contract was sustained in the face of a challenge based upon a federal statute. The Supreme Court of Ohio did not deliver an opinion on the matter, but it did furnish a certificate, as part of the record, to the effect that the federal question was presented and necessarily passed upon.

Such a certificate was relied upon in *Whitney* v. *California*, 274 U. S. 357, to show that a challenge to the state syndicalism act, based on the Fourteenth Amendment to the Federal Constitution, had been considered and passed upon. There was no other showing in the record that any federal question had been raised or considered.

In *Lisenba* v. *California*, 314 U. S. 219, the petitioner raised a federal question (under the Fourteenth Amendment) for the first time on a second petition for rehearing in the state supreme court. The state court's ruling stated merely: "The petition for a rehearing herein is denied." A certificate was used to clarify the grounds relied upon in denying the rehearing. Justice Roberts, speaking for the Court, described the procedure as follows:

"The Chief Justice of the State . . . executed a certificate in which he enumerated the constitutional questions presented by the second petition for rehearing; stated that the court entertained the petition, and explicitly overruled each of the contentions made therein; certified that the decision denying rehearing 'is to be interpreted and considered as holding against the appellant's contention that his rights under the Fourteenth Amendment to the Constitution of the United States . . . were violated'; and concluded: 'It is ordered that this certificate be filed in this court and made a part of the record on appeal to the Supreme Court of the United States.' On the record so made, this Court has jurisdiction to review the judgment." *Id.*, 221–222.

In *Hammerstein* v. *Superior Court*, 341 U. S. 491, the Supreme Court was called upon to review judgments of

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the State of California. After argument, the cause was continued to enable the petitioner to obtain a certificate explaining whether the decision had rested on an adequate state ground. Such a certificate was obtained, and the Court then proceeded with the case in the light of the information presented.

The governing statute itself provides another important restriction, for it states that the Supreme Court may review "final" judgments of the highest available state courts, thus precluding review of intermediate stages in state court proceedings. 28 U. S. C. § 1257. This provision is designed to insure that the state court system will have a full opportunity to resolve the dispute before the Supreme Court intervenes as final arbiter of federal questions. The need for any review in the federal courts may be entirely avoided, if the state court decision comes to rest on an adequate state ground before it achieves the finality necessary to Supreme Court review. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 edition), pp. 51–98.

The function of the United States Supreme Court in reviewing decisions of state courts, though of great importance, is thus carefully circumscribed, and the role of our state courts is correspondingly enhanced. The multitude of cases in this field illustrate the degree to which the federal courts show deference to the sovereignty of the States and meticulously avoid treading on their domain.

There are other ways in which this deference to state authorities is also shown by the federal authorities.

First, is the precaution taken against federal courts enjoining state officers.

In 1908, the decision in *Ex parte Young*, 209 U. S. 123, clearly established the principle that lower federal courts could enjoin state officers from enforcing unconstitutional state statutes, as I explained in a prior Lecture. The impact of that decision was of enormous importance, for

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it meant that a single district court judge could enjoin the carrying out of state legislative programs of major importance.

In order to avoid these problems, a remedy, previously applied in other areas, such as the Expediting Act of 1903, which provided for trial of certain anti-trust cases by special courts composed of three judges, was adopted. Similar procedure had been provided for in other statutes. So it was that three-judge courts were required to pass on the constitutionality of state legislation before injunctions could be issued.

Two basic arguments were advanced in support of the provision for the convening of three-judge courts to hear suits seeking interlocutory injunctions against state court proceedings. The first contention, and the basic reason advanced, was that it was an affront to the dignity of the States to permit such drastic action by a single federal judge. Senator Lee Overman of North Carolina, a leading advocate of the measure, summed up this position as follows: "After the legislature has passed a statute—it having passed the judiciary committee and the house and the senate and become a law—and the attorney-general says it is constitutional, and he is attempting to enforce it, the nonresident or the railroad has its remedy by going to the supreme court, and then by writ of error to the Supreme Court of the United States. It is only in very extraordinary cases that this remedy is sought, and when it is sought I am opposed to allowing one little federal judge to stand up against the governor and the legislature and the attorney-general of the State and say, 'This act is unconstitutional' . . . .

"The point is, this amendment is for peace and good order in the State. Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is un-

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constitutional the people would rest easy under it. But let one little judge stand up against the whole State, and you find the people of the State rising up in rebellion. The whole purpose of the proposed statute is for peace and good order among the people of the States." 45 Cong. Rec. 7256.

The view was stated thus by Senator Norris Brown of Nebraska:

". . . it is a very serious matter to the people of a State, who, following constitutional procedure and lines, enact legislation which affects all the people of the State to have a law set aside by a nonresident appearing in the federal court on a writ of injunction, and holding the State and the people of the State up in the air indefinitely." 45 Cong. Rec. 7257.

A second and closely related argument was that the use of interlocutory injunctions was being abused by some of the district court judges, who failed to exercise the proper restraint in so serious a matter. One illustration was furnished by Senator Overman, who stated:

"I saw in Moody's Magazine last week that there are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney-general, and some relief of this sort ought to be given." 45 Cong. Rec. 7256.

Perhaps the most notable feature of the statute, as originally enacted, was the limited nature of its provisions. The Act merely applied to interlocutory injunctive measures, not to permanent injunctions, and even as to the former it was limited to attacks on state statutes. The subsequent history of the Act has consisted largely of efforts to extend the coverage into a well-rounded scheme.

One such extension occurred in 1913, when the three-judge requirement was made applicable to applications for interlocutory injunctions restraining a state officer in the enforcement or execution of an order made by an

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administrative board or commission acting pursuant to state statutes.*

The Judiciary Act of 1925 removed an obvious anomaly in the original Act by providing for a three-judge court in the hearing on a final injunction. This did not provide a complete solution, however, for in *Smith* v. *Wilson*, 273 U. S. 388, the Court held that the amendment applied

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*The purpose of the measure was explained in the Report which accompanied it:

"This legislation is demanded because a few judges have sometimes hastily or improvidently issued interlocutory injunctions suspending the enforcement of a State statute or an order made by a State railroad commission acting under the authority of the statute of a State and have for an unjustifiably long time held up or prevented the operation of a State statute or an order of a State railroad commission.

"In January last, Gov. Byrne, of South Dakota, in his inaugural address, said:

"'It was the boast of the representatives of the railroads that in 13 minutes after the governor had signed at Pierre the act fixing passenger fares at 2 cents per mile the Federal judge at Sioux Falls had signed his sweeping order restraining the Attorney General and all State attorneys from attempting to enforce it. Nearly four years have passed since then, but we have not yet been able to learn from the court whether or not the fares fixed are reasonable. It is now nearly six years since the order of the board fixing 2½ cents per mile as the maximum charge for passenger fares was tied up by injunctions, yet in that time the court has not said whether such order is right or wrong.

"'Why should not these matters be tried and settled in our own State courts? Is there a possibility that they would do injustice to any of these corporations? The idea is preposterous. . . . It would seem that no effective regulation of freight and passenger rates within State lines is possible so long as the lower Federal courts are thus permitted to annul and bring to naught all efforts on the part of the people of the State to secure relief.' . . .

"The committee is of the opinion that the statute should be broadened, so as to prevent this kind of interference with State officials who are performing their duties under the provisions of a statute enacted by the legislature of a State." H. R. Rep. No. 1584, 62d Cong., 3d Sess.

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only when an interlocutory injunction had also been sought. Finally, in the 1948 revision, the confusion resulting from the *Smith* case was resolved by making the three-judge procedure applicable on hearings for either interlocutory or permanent injunctions.

In its present form, the Act (which is now codified as 28 U. S. C. § 2281) provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

The "judicial gloss" which has been placed on this legislation is as interesting as the legislative background.

In *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290, the Court held that three judges were required to hear an attack on an administrative order, though the constitutionality of the basic statute on which the order was grounded was not itself at issue.

Ex parte Williams, 277 U. S. 267, involved an assessment of railroad property for taxation by a state board. The court held that such an assessment is not an order within the meaning of the three-judge statute and therefore the statutory requirement does not apply to it.

In the leading case of *Ex parte Collins*, 277 U. S. 565, a suit was brought to enjoin the City of Phoenix, Arizona, from proceeding under a local resolution in paving a street on which the complainant was an abutting owner. The challenge was to the state statute under which the assessment for the improvements was to be made. The Court held that the action was not one which required the three-judge procedure, Justice Brandeis, speaking for the Court, declared:

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"That section was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public. The lower courts have held with substantial unanimity that the section does not govern all suits in which it is sought to restrain the enforcement of legislative action, but only those in which the object of the suit is to restrain the enforcement of a statute of general application or the order of a state board or commission. Thus, the section has long been held inapplicable to suits seeking to enjoin the execution of municipal ordinances, or the orders of a city board. And likewise it has been held that the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved. Despite the generality of the language, we think the section must be so construed." *Id.*, 567–568.

The Court held, in *Rorick* v. *Commissioners*, 307 U. S. 208, that a suit by state drainage district bondholders did not warrant three-judge procedure because the statute under attack was not one of general application, but affected only a particular district of the State.

In applying the requirement that the statute attacked must be one of general state-wide importance, the Court does not look merely to the nature of the officers whose action is involved, as *Cleveland* v. *United States*, 323 U. S. 329, makes clear. The Court held in that case that three judges were required to hear a suit to restrain county and municipal officials from assessing and collecting unconstitutional taxes, where the officials acted in the interest of the State and pursuant to a statute of statewide application. Justice Roberts, speaking for the Court, pointed out the controlling principle as follows:

"The section is inapplicable to suits challenging local ordinances or statutes having only local application. But these cases involve state law the application of which is state-wide. If the taxing officials were, in these instances,

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though acting under such a law, doing so as local officials and on behalf of the locality and not as officers of the State, the section is inapplicable to suits to restrain them. Here, however, the officials were enforcing state laws embodying a state-wide concern and in the State's interest, and in such a case § 266 is applicable." *Id.*, 332.

The requirement that a claim of unconstitutionality be made has been interpreted as requiring a challenge based on the Federal Constitution. (See *Ex parte Buder*, 271 U. S. 461, 465.)

Moreover, it is necessary to challenge the constitutionality of the statute as applied, rather than the constitutionality of the result obtained by the use of a valid statute. Such an attack on erroneous administrative action has been held insufficient. *Ex parte Bransford*, 310 U. S. 354.

In *Phillips* v. *United States*, 312 U. S. 246, an effort was made to enjoin the Governor of Oklahoma from using martial law in a dispute arising out of the flooding of roads by construction of a dam. The Court held that it was not a proper case for use of the three-judge procedure, explaining:

"Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." *Id.*, 252.

"To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's legislative policy.

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This was the aim of Congress and this is the reconciling principle of the cases." *Id.*, 251.

In *American Federation of Labor* v. *Watson*, 327 U. S. 582, the Court held that the three-judge requirement applied to a suit to enjoin the enforcement of a state constitution. It was pointed out that it "would . . . be somewhat incongruous to hold that a single judge, while prohibited from enjoining action under an act of the state legislature, would be free to act if the state constitution alone were involved. . . . In our view the word 'statute' in § 266 [predecessor of § 2281] is a compendious summary of various enactments, by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions." *Id.*, 592, 593.*

Second. Another way in which deference is shown state authorities is the restraint which Congress has placed on the use of injunctions by federal courts to enjoin state taxes.

The Tax Injunction Act of 1937, which now appears as 28 U. S. C. § 1341, provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The purpose of enacting this legislation was explained in S. Rep. No. 1035, 75th Cong., 1st Sess., as follows:

"It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the col-

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*For other examples of cases holding the three-judge procedure applicable in particular fact situations, see: *Herkness* v. *Irion*, 278 U. S. 92 (challenge to constitutionality of administrative order denying permit); and *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89 (criminal statute of statewide application).

For further illustrations holding the three-judge procedure inapplicable, see: *Ex parte Public Bank*, 278 U. S. 101 (collecting taxes for local use); and *Wilentz* v. *Sovereign Camp*, 306 U. S. 573 (performance of local function by local officers).

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lection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies to survive while long-drawn-out tax litigation is in progress. If those to whom the Federal courts are open may secure injunctive relief against the collection of taxes, the highly unfair picture is presented of the citizen of the State being required to pay first and then litigate, while those privileged to sue in the Federal courts need only pay what they choose and withhold the balance during the period of litigation.

"The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy."

Senator Homer T. Bone, of Washington, who introduced the measure, explained the necessity for such legislation by citing an illustration from the State of Washington, indicating the abuse which resulted from federal court injunctions of state taxes:

"'In the fall of 1926 and the beginning of 1927 the Northern Pacific and the Chicago, Milwaukee, St. Paul & Pacific Railroad (the 'Milwaukee') instituted suits in the Federal court at Spokane to restrain the collection of their taxes, the N. P. for its 1925 and 1926 taxes, and the Milwaukee for its 1926 and 1927 taxes. Each year thereafter similar suits were instituted by the two com-

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panies, so that by the time decrees in the original suits were entered by the district court in September 1932 suits involving the N. P. taxes for 1926 to 1931 were pending, and suits involving the Milwaukee taxes for 1926 to 1931 were likewise pending. Later suits involving the 1932 N. P. taxes and the 1932 and 1933 Milwaukee taxes were instituted.

"'The 1925 and 1926 N. P. suit and the 1926 and 1927 Milwaukee suit took a year and a half to try, the trial being had before a special master, and, although every effort was made by the county defendants to press the suits to judgment, decrees were not entered in those suits, as I have said, until September 1932. By this time the counties were so hard-pressed for money by reason of these railroads withholding such a large proportion of their taxes, that the railroads, the N. P. and the S. P. & S. (another litigating road), were in a position to dictate the terms of settlement, and as a result the counties threw up their hands and by agreed decrees entered February 20, 1933, consented to a settlement of the N. P. suits, which settlements resulted in the counties receiving substantially $1,500,000 less in taxes for the years 1927 to 1932 than they would have received under the formula of valuation announced by Judge Webster in his decision of the 1925 and 1926 case. . . .

"'The Milwaukee's offer of settlement was too ridiculous to be stomached by the counties, even in their distressed financial condition, and an appeal was taken to the Circuit Court of Appeals, resulting in a reversal of the 1926 and 1927 Milwaukee tax decree, in July 1934. . . . The tax commission thereupon made assessments of the Milwaukee property for the years 1926 to 1932, and on November 30, 1934, the Milwaukee elected to pay the taxes as so reassessed, on the 10-year installment plan. In neither the N. P. nor the Milwaukee settlement was any interest allowed on the taxes wrongfully withheld for all these years." 81 Cong. Rec. 1416.

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Shortly after the passage of the Tax Injunction Act of 1937, the Supreme Court was called upon to interpret its provisions in *Kohn* v. *Central Distributing Co.*, 306 U. S. 531. The case involved a Kentucky tax which was challenged under the Commerce, Contract, and Due Process Clauses. The tax authorities contended that the complainants had an adequate legal remedy under state law, and therefore no federal interference was permissible. Certain whiskey had been attached, which the complainants claimed was subject to their mortgage lien. The mortgagees of the taxpayer were said to have a remedy by appearing in the attachment suit in the state court, where the validity of the tax could be passed on in the first instance. The Court held that the Act barred the suit in such circumstances.

In *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, the relief sought was a declaratory judgment that the state law was unconstitutional. The Court found it unnecessary to determine whether the statute prohibited such declaratory relief, for it held that such relief should be denied in the exercise of general equitable discretion, stating:

"The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes." *Id.*, 300–301.

The absence of an adequate state remedy was found to permit federal court action in *Hillsborough* v. *Cromwell*,

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326 U. S. 620, where the relief sought was a declaratory judgment that certain assessments on intangible personal property were void. The *Huffman* case was distinguished on the ground that in that case there was an adequate state remedy, whereas the state procedure in the *Cromwell* case was not sufficient. That procedure, under the applicable New Jersey law, was apparently restricted to proceedings against other members of the taxpayer's class for the purpose of having their taxes increased; the taxpayer, who claimed discriminatory treatment, could not obtain equalization by reduction in his own assessment. It was contended that this restrictive state procedure had been modified by a subsequent opinion of the state court. The Court replied:

"In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative . . . whether the State affords full protection to the federal rights. In the second place, the state board of tax appeals to which respondent might have appealed concededly has no right to pass on constitutional questions. Its judgments may be reviewed by the New Jersey Supreme Court by certiorari. The allowance of that writ, however, is not a matter of right, but purely discretionary. And the refusal of a writ of certiorari by the Supreme Court may not be judicially reviewed by the Court of Errors and Appeals. Accordingly we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause." *Id.*, 625–626.

The approach of the Court in cases arising under § 1341 is illustrated by the recent decision in *Georgia R. Co.* v. *Redwine*, 342 U. S. 299. Three state remedies were said to be available, and the Court considered each in turn. The first, a suit for injunction, had already been tried without success. The second, arresting tax execution by affidavits of illegality, would have required the filing of over three hundred separate claims in fourteen different counties to protect the single federal claim asserted. The third

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method, suing the State for refund after payment of the taxes, was applicable only to taxes payable directly to the State, which amounted to less than 15 per cent of the total taxes in controversy. Therefore, the Court concluded that there was no plain, speedy, and adequate remedy available.

Third. Another way in which deference is shown state authorities is the restraint Congress has placed on federal interference with regulation of public utilities by the States.

The decision of the Supreme Court in *Ex parte Young*, 209 U. S. 123, coupled with an increasing need for public utility regulation, led to agitation to eliminate federal court interference with state control of public utility rates. The *Young* case enabled a utility to contest any rate regulation in the federal courts. Such contests were resorted to in order to impede the trend toward regulation of local utilities, which had increased in size and power so that more effective state regulation was imperative.

A public utility could force a state regulatory body to submit the constitutionality of its orders to trial in a lower federal court. Such a method not only involved a federal court's passing upon validity of state regulation to the exclusion of a determination by the State's own courts; it also led to considerable expense and delay, because it led to considerable duplication of effort. Trial in the state court would be upon the record of the utility commission, whereas the federal court would undertake a trial *de novo*. The utilities could pass the extra expense on to the consumers, so the burden fell on the citizens in the form of increased taxes or increased rates, regardless of the outcome of the litigation. Threat to resort to federal courts became a powerful weapon of the utilities. For example, the Georgia Public Utility Commission, after using up its appropriations on several occasions in its own hearings, was forced to withdraw its rate orders

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as soon as the utilities went into the federal courts and filed applications for injunctions.

The solution, which was finally adopted, was to divest the inferior federal courts of jurisdiction in such cases. This was accomplished by the Johnson Act of 1934, now codified in 28 U. S. C. § 1342, which provides:

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State."

The abuses which the Act was designed to correct were summarized in the Report by Senator George Norris, Nebraska, of the Committee on the Judiciary (S. Rep. No. 125, 73d Cong., 1st Sess.) p. 8:

"A delay of justice is very often an absolute denial of justice. These orders of State commissions are entered as and apply to the date when the findings are made. Before these great corporations get through with litigating in State courts and Federal courts, and by the time final judgment is rendered, the people for whose benefit the original order is made have nearly all died of old age; the order when finally entered may have no application whatsoever to the conditions existing at the time the order is entered. What should have been a proper rate at one particular time may be too high or too low, if applied to a date several years later."

Soon after the passage of the Act, the Court was called upon to interpret its provisions in *Corporation Commis-*

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sion v. *Cary*, 296 U. S. 452. A suit had been brought to enjoin an order of a state commission of Oklahoma reducing gas rates. The order was challenged as confiscatory in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Federal District Court found that there was serious uncertainty as to whether opportunity was provided for judicial review of the Commission's orders in the state court, due to "diametrically opposed decisions" of the state court. That court, therefore, was of the opinion that no showing of the plain, speedy, and efficient remedy required to bring the Act into operation was present. The Supreme Court affirmed, explaining:

"The District Court found that it had been repeatedly held by the state court that the reviewing power conferred upon it by the provision of the state constitution was legislative in character . . . and upon the question whether any opportunity was afforded in the courts of the State for a judicial review of an order of the Commission, the District Court found serious uncertainty because of 'diametrically opposed decisions' of the state courts. And as it did not appear that 'a plain, speedy, and efficient remedy' could be had 'at law or in equity in the courts of such State,' the District Court took jurisdiction and granted an injunction pending a hearing upon the merits." *Id.*, 458.

The chief problem in interpreting the Act, as foreshadowed by the *Cary* case, has centered in the requirement of a plain, speedy, and efficient remedy under the state law. Thus, in *Mountain States Co.* v. *Commission*, 299 U. S. 167, the Court held that the requirement was not met where a state statute restricted the granting of injunctions or stays prior to final determination of a challenge to the rates set by the state commission, even though the state statute was of doubtful validity.

An adequate state remedy was also found to be lacking in *Driscoll* v. *Edison Co.*, 307 U. S. 104, where remedy by injunction was limited to proceedings questioning the

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jurisdiction of the commission, and the remedy at law by appeal did not postpone the rates *pendente lite*.

In *Public Utilities Commission* v. *United Fuel Co.*, 317 U. S. 456, the challenge was directed at orders of a state commission to fix rates for natural gas transported and sold in interstate commerce. The power to set such rates had been vested exclusively in the Federal Power Commission. Therefore, the Johnson Act was held to be inapplicable because the orders interfered with interstate commerce (as stated in the second condition to the Johnson Act) to the extent that they attempted to regulate matters in interstate commerce which Congress had subjected to exclusive federal control.

The absence of notice and hearing before entry of the order was held to make the Act inapplicable in *Petroleum Co.* v. *Commission*, 304 U. S. 209.

A *fourth* statutory provision which has served to reduce friction between state and federal courts is the "Anti-Injunction Statute." This Act dates back to a statute of 1793, which provided "nor shall a writ of injunction be granted to stay proceedings in any court of a state." In its present form, the statute provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." * 28 U. S. C. § 2283.

During the decades following the enactment of the original Anti-Injunction Act, certain exceptions were engrafted onto it. Some were the result of statutory provision. There was the exception which excluded from the Act's operation injunctions in connection with bank-

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*In *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, antedating the present codification, the Court refused to recognize another claimed exception, involving "relitigation cases," where a federal court sought to protect those who had obtained a favorable decree in the federal court from being forced to relitigate the same matter in the state courts.

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ruptcy proceedings (36 Stat. 1162) which in American law are matters over which Congress has primary jurisdiction.

In addition to a few legislative qualifications, the courts developed an exception in the "res" cases. That is to say, the rule evolved that the court which first took possession of an item of property withdrew it from the reach of the other. In other words, the federal court could restrain state interference with property in the custody of the federal court. See *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 235.

Another judicially created exception was in the "fraud" cases, where federal courts enjoined enforcement of judgments fraudulently obtained in the state courts. See *Wells Fargo* v. *Taylor*, 254 U. S. 175.

The term "necessary in aid of its jurisdiction" as embodied in the present statute was interpreted in *Capital Service* v. *Labor Board*, 347 U. S. 501. The case arose out of a labor dispute, which had led the employer to ask the state court to enjoin the union's picketing activities. Then the employer filed a charge of an unfair labor practice with the National Labor Relations Board. The state court issued a preliminary injunction. Thereupon the Board requested the federal court to enjoin enforcement of this injunction in order to avoid interference with the Board's own proceedings in the matter. At the same time, the Board sought an injunction from the District Court against the union's activities pending final adjudication by the Board. The Supreme Court held that the injunction issued by the District Court against the state court proceedings was "necessary in aid of its jurisdiction," explaining:

"The state court injunction restrains conduct which the District Court was asked to enjoin in the . . . proceeding brought in the District Court by the Board's Regional Director against the union . . . . If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal

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District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary . . . it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree." *Id.*, 505–506.

The restraints Congress has placed on the federal judiciary, compelling respect for the state courts in the administration of federal law, tell only a part of the story. The United States Supreme Court itself has been most sensitive to avoiding frictions that might well result from our dual system of courts.

Harkin v. *Brundage*, 276 U. S. 36, involved a controversy between state court receivers and a federal court receiver over the possession of the assets of a certain corporation. The Court, speaking through Chief Justice Taft, stated:

"As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and can not be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the priority of jurisdiction." *Id.*, 43.

The Court went on to hold that the federal receiver had priority of jurisdiction, that the jurisdiction was not concurrent. The Court held, however, that there had been a fraud upon the state court by which the appointment of state court receivers was delayed so a federal receiver would be appointed; and therefore the Court directed the federal court to surrender the property in dispute to the state court receivers.

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Penn Casualty Co. v. *Pennsylvania*, 294 U. S. 189 and *Pennsylvania* v. *Williams*, 294 U. S. 176, reveal the efforts of the Court to accommodate competing interests in particular assets.

The latter case involved rival claims by a federal district court and a state agency, each asserting authority to liquidate an insolvent building and loan association, organized under the laws of Pennsylvania. The local statutes provided for the action of the state officer in substantially the same manner and with substantially similar results as those to be attained in receivership proceedings in the federal courts. The Court held that the discretion of the federal court should have been exercised to relinquish its jurisdiction in favor of the statutory administration of the corporate assets by the state officer. "It is in the public interest," said Justice Stone, speaking for the Court, "that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Id.*, 185.

In the *Penn Casualty* case, the Court held that even though a federal district court had first acquired jurisdiction of a suit to liquidate an insolvent insurance company, a state court might properly authorize a state officer to apply to the district court to relinquish its jurisdiction in favor of state administration.

The federal courts frequently abstain from interfering in proceedings where they conclude that the State provides a more suitable forum for initial resolution of the problems involved. As stated in *Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491:

"Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Id.*, 495.

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The leading case of *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, involved an attempt to enjoin a state commission in Virginia from enforcing an order fixing passenger rates. The railroads which challenged the rates could have appealed the matter to the state courts, and therefore the Court held that they should do so before seeking federal intervention.

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478, involved a dispute as to the legal right to drill for fugitive oil under the right of way of a railroad, which traversed a newly discovered oil field. Since the dispute arose in connection with federal bankruptcy proceedings, the federal court might have resolved the questions of property law involved, but that would have involved decision of matters which, it was felt, could best be resolved by the state courts. Therefore, the cause was remanded with instructions to provide for submission of the question of fee simple ownership to the Illinois state courts. Justice Black, speaking for the Court, stated the reason for such a procedure as follows:

"Decision with which the federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme." *Id.*, 483–484.

One means of achieving the desired result is by strict adherence to the various jurisdictional requirements of the lower federal courts, so that they will not transcend the

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boundaries of their limited jurisdiction. (See *Healy* v. *Ratta*, 292 U. S. 263.) Even where jurisdiction is clearly present, however, the federal courts may not act. For the attitude of the Supreme Court has found expression in the abstention doctrine, under which federal courts, in the exercise of equitable discretion, seek to avoid friction with state courts and agencies.

A leading case is *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496. There, a suit was brought in a federal district court to enjoin an order of the Texas Railroad Commission, requiring sleeping cars to be under the direction of conductors, rather than of porters. There was a possibility that the Commission's action was not authorized by state law, which would have avoided the need for federal interference. Therefore, the district court was directed to retain the case pending determination of proceedings to be brought in the state court to resolve the issues of state law involved. The Court stated:

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . ." *Id.*, 500.

The abstention doctrine has been further developed in subsequent cases. *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, involved a suit in a federal court to obtain a declaration on whether a local ordinance should be interpreted as forbidding delivery of milk in paper containers and whether, if so interpreted, it would be valid. While the cause was pending before the district court, another milk company, the parent of complainant, instituted an action in the state courts raising the same issues. ~~In following the views of the *Pullman* case, the~~ Court held that the parties should be remitted to the state courts for litigation of the state questions, which involved the meaning of the ordinance and a possible conflict of the ordinance with a state statute.

"It is an exercise of a 'sound discretion, which guides the determination of courts of equity.' . . . In this case, that discretion calls for a remission of the parties to the

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state courts, which alone can give a definitive answer to the major questions posed. Plainly, they constitute the more appropriate forum for the trial of those issues. . . . Considerations of delay, inconvenience, and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole." *Id.*, 172–173.

In *Burford* v. *Sun Oil Co.*, 319 U. S. 315, an attack was made in a federal district court on the validity of an order of the Texas Railroad Commission, which granted a permit to drill certain oil wells. The Court was called upon to determine whether the district court, as a matter of sound equitable discretion, should have declined to exercise its jurisdiction in that case. Texas' attempts to control the flow of oil and at the same time protect the interests of the many operators led to complex geological-legal problems. Texas' interests were not only in conserving gas and oil, but also in weighing the impact of the industry on the whole economy of the State, for the oil industry is of great importance in that State. The primary task of adjusting the diverse interests involved had been delegated by the State to the Railroad Commission. The state legislature had established a thorough system of judicial review by the state courts. The instant case raised several problems of purely local law, as to which the federal courts could only attempt to ascertain the applicable rules. Past interference by the federal courts had led to repeated problems in administering the Texas regulatory system.

"The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal

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courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand." *Id.*, 333–334.

In *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, a federal district court was directed to retain an action seeking to enjoin a state tax until appropriate proceedings were brought in the state court to determine questions of local law, the resolution of which was necessary before solution of the federal questions involved could be attempted.

I have already referred to the case of *American Federation of Labor* v. *Watson*, 327 U. S. 582, in connection with the three-judge requirement. That case also held that the federal district court should not have passed on the merits because they involved the meaning of a new provision of the Florida constitution which had not been construed by the courts of that State. The Court followed the course adopted in the *Pullman* and *Spector* cases and directed the district court to retain the cause pending determination of proceedings in the state courts.

In *Alabama Commission* v. *Southern R. Co.*, 341 U. S. 341, a railroad sought permission from a state commission to discontinue certain intrastate services which were allegedly being operated at a loss. The commission denied the request. Instead of pursuing its right to appeal to the state courts, the railroad filed an action in the federal district court and obtained injunctive relief under the three-judge procedure referred to above. The Court held that jurisdiction should not be exercised by the federal district court as a matter of sound equitable discretion, explaining:

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief

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may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.'" *Id.*, 349–350.*

One interesting aspect of our dual system of courts has been the utilization by Congress of state courts for litigation under federal statutes.

In 1794, the Carriage Tax Act provided that fines, penalties, and forfeitures might be sued for in the state courts; and the License Tax of that year on wines and spirits made a similar provision. 1 Stat. 373, 376, 378.

An Act to establish trading posts with the Indian Tribes provided that certain penalties were recoverable in state courts, 1 Stat. 452, and similar provision was made in the Paper Stamp Tax Act of 1797. 1 Stat. 527, 532.

In 1799, Congress authorized state trial of criminal offenses under the Post Office Act. 1 Stat. 733. (See 39 U. S. C. § 825.)

An 1806 Act authorized certain state courts to entertain cases involving revenue collection. 2 Stat. 354.

In 1815, an Act provided for state courts to assist in enforcing federal revenue statutes. 3 Stat. 244.

In spite of these early efforts to relieve the federal courts of litigation by authorizing state court action, when Congress permitted suits in the state courts to enforce rights under the Federal Employers' Liability Act, the obligation of state courts of competent jurisdiction to recognize the rights created by the federal statutes was questioned. The Court held that rights arising under the Act were enforceable in the courts of the States when their jurisdiction, as prescribed by local laws, was adequate for this

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*For further illustrations of the Court's application of the abstention doctrine, see *Shipman* v. *DuPre*, 339 U. S. 321, and *Albertson* v. *Millard*, 345 U. S. 242.

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purpose. *Second Employers' Liability Cases*, 223 U. S. 1, 55.

When such cases reach the United States Supreme Court, the scope of review is, of course, quite broad, since the statutory basis of the action is of federal origin, and the Supreme Court sits as the final arbiter. The Court seeks, for example, to insure that the liberal policy of the Employers Liability Act in favor of preserving jury trial on such issues as negligence and proximate cause, is preserved. See *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407.

An interesting case which arose out of the Emergency Price Control Act ~~in World War II~~ is *Testa* v. *Katt*, 330 U. S. 386. That case involved a statutory provision for treble damage suits, which the state court held would not be enforced, because of its penal nature. The Court rejected such a claim, pointing out that the state courts, which had jurisdiction appropriate for the purpose, could not refuse to enforce such federal actions. Of course, Congress cannot compel a State to provide courts for the enforcement of such suits, where, however, a state court does entertain such actions, it cannot refuse to apply the appropriate federal law. (See *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377.)

During the 166 years in which our dual court system has operated, it has, on the whole, functioned rather smoothly.

A major source of irritation was removed ~~in~~ *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, where the notion of a general federal common law was repudiated. It is now established that there is no transcendant body of federal common law in either the civil or criminal field. Federal courts sit to enforce the provisions of the Federal Constitution, federal statutes, treaties, and international law, and, in diversity cases, to apply the appropriate rules of state law. They also fashion admiralty law as the recent cases *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. —, and *Boudoin* v. *Lykes Bros. Steamship Co.*, 348 U. S. —, illustrate as well as any. And the Supreme

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Court in cases involving its original jurisdiction, discussed in Lecture II, fashions rules of law governing water rights, property rights, and other subjects involved in controversies arising between the States.

One of the basic reasons for the harmonious operation of our dual system is the deference which the federal judiciary has shown to the judicial systems of the States. This deference has resulted in part from statutory provisions; but judge-made rules have also played an important role.

This deference to the state courts has not meant that the federal courts have abdicated their function as expounders and vindicators of federal rights. If the state courts fail to take the proper action, the federal judiciary does not hesitate to intervene. The role of our federal courts in such circumstances is perhaps best illustrated by the procedure followed in cases where state prisoners seek relief by *habeas corpus* for asserted violations of their federal constitutional rights.

The Great Writ of *habeas corpus* is firmly entrenched in American law.* The Constitution provides in Article I, Section 9, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or Invasion the public Safety may require it." The power of the judiciary to issue the writ cannot be denied by the Congress or the Executive except in the narrow class of cases indicated.** The power inheres in the judicial power as defined by Article III and Article I, Section 9.

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*The Indian Constitution also provides for *habeas corpus*. See Articles 32 (2) and 226.

**While the Constitution provides that the writ of *habeas corpus* may be suspended in times of rebellion or invasion (Article I, Section 9), it does not indicate whether the suspension is a function of Congress, the President, or of both acting concurrently. President Lincoln asserted the power as an executive function during the Civil War. See *Ex parte Merryman*, 17 Fed. Cas. 144. Congress subsequently ratified this action, 12 Stat. 755. So the matter did not come to a head; and it remains unresolved to this day.

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The governing statute provides that the writ "may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U. S. C. § 2241. Several classes of cases in which the writ may issue are enumerated in the statute; but for purposes of our present discussion, it is sufficient to note that one of the classes consists of instances where a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." *Id.*

The Constitution permits the lower federal courts to entertain such actions by state prisoners in the first instance. But in deference to the state courts, that course is not followed. Instead, a state prisoner is required to seek relief in the state courts by the appropriate remedy before resorting to federal relief. *Ex parte Hawk*, 321 U. S. 114. This judicially-developed doctrine is now included in 28 U. S. C. § 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." *

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*The "exhaustion doctrine" has been carried to the extreme point where a state prisoner must not only seek the relief available to him in the state courts, but must also ordinarily seek certiorari in the Supreme Court of the United States from the refusal of the highest available state court to grant relief. *Darr* v. *Burford*, 339 U. S. 200.

Where, however, on direct review of his conviction, a state prisoner's claim of federal right has been rejected by the highest court of the

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After state remedies have been exhausted, a state prisoner seeking vindication of a federal right may then resort to a federal district court for relief by way of *habeas corpus*. In *Moore* v. *Dempsey*, 261 U. S. 86, the defendants had been hurried through a sham trial under mob domination without semblance of due process. Not being able to obtain relief under the state court procedures, they sought *habeas corpus* in a federal district court. That court dismissed the writ, without a hearing, on the merits of the charges made. In holding this to be error, the Court, speaking through Justice Holmes, explained:

". . . it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed." *Id.*, 92.

Another illustration is furnished by the recent case of *Massey* v. *Moore*, 348 U. S. 105. There the petitioner, having exhausted his state remedies, sought *habeas corpus* in the federal courts, based on allegations that he had been tried without counsel while insane. The Court held that he was entitled to a hearing on these charges in the federal court, since the charges, if true, would amount to a violation of due process.

The dual system is in many respects cumbersome, expensive, and productive of delays in the administration of

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State, and an application to the United States Supreme Court for certiorari has been denied, the "exhaustion doctrine" is satisfied. "It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review with another petition for certiorari directed to the Supreme Court." *Brown* v. *Allen*, 344 U. S. 443, 447.

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justice. The Australian and Indian systems have much to be said for them. But the American dual system is part of the price we pay for federalism. That federalism is quite different, constitutionally, from either Australia's or India's. It has presented difficulties and perplexities that the other federal systems have not experienced. It has required judicial statesmanship of a high order to prevent unseemly conflicts between the two judicial systems. But the days of crisis have passed; regimes and attitudes of harmony and cooperation have developed; and the tradition of deference of one court system to the other has brought dignity and a sense of responsibility to each.

APPENDIX

TABLE I.—*Civil cases commenced in the United States district courts during the fiscal years 1945-54, by basis of jurisdiction and nature of suit*

Basis of jurisdiction and nature of suit	Number of cases									
	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954
Total cases	60, 965	67, 835	58, 956	46, 725	53, 421	54, 622	51, 600	58, 428	64, 001	59, 461
United States cases	**43, 110**	**45, 694**	**29, 834**	**16, 381**	**22, 035**	**22, 429**	**19, 424**	**22, 880**	**23, 881**	**19, 949**
United States plaintiff	39, 175	40, 437	24, 037	11, 151	17, 047	17, 921	15, 097	17, 771	17, 751	15, 057
United States defendant	3, 935	5, 257	5, 797	5, 230	4, 988	4, 508	4, 327	5, 109	6, 130	4, 892
Private cases	**17, 855**	**22, 141**	**29, 122**	**30, 344**	**31, 386**	**32, 193**	**32, 176**	**35, 548**	**40, 120**	**39, 512**
Federal question	3, 613	5, 222	9, 375	6, 986	6, 575	6, 775	6, 474	7, 663	8, 982	7, 547
Diversity of citizenship	5, 282	6, 273	8, 615	10, 818	12, 347	13, 124	13, 490	15, 135	17, 383	18, 615
Admiralty	1, 231	1, 265	1, 782	3, 235	3, 080	2, 757	2, 550	2, 764	3, 223	2, 947
General local jurisdiction	7, 729	9, 381	9, 350	9, 305	9, 384	9, 537	9, 662	9, 986	10, 532	10, 403
UNITED STATES CASES										
United States plaintiff	39, 175	40, 437	24, 037	11, 151	17, 047	17, 921	15, 097	17, 771	17, 751	15, 057
Condemnation of land	1, 307	536	528	545	754	759	940	1, 000	998	720
Enforcement of Federal statutes:										
Price control and rationing—OPA	28, 653	31, 252	15, 203	3, 569						
Fair Labor Standards Act	458	358	243	266	364	337	511	524	645	380
Rent control—OHE					6, 625	5, 252	3, 767	3, 291	2, 698	56
Defense Production Act, 1950							24	2, 127	1, 073	43
Denaturalization	200	215	132	350	253	605	611	272	317	333
Antitrust laws	20	18	33	19	39	42	37	20	16	21
Other	346	159	179	200	245	295	211	209	198	224
Forfeitures:										
Food and drug laws	3, 477	3, 272	2, 438	1, 297	2, 107	1, 600	1, 497	1, 844	1, 549	1, 222
Liquor laws	595	469	540	427	582	519	646	683	754	691
Marine	135	20	18	27	30	26	37	59	92	59
Export control	237	265	263	91	299	76	181	239	233	28
Other	97	112	137	155	244	303	302	477	439	348
Penalties:										
Twenty-eight-hour law	253	324	372	411	163	188	185	126	135	125
Safety Appliance Act	255	155	126	177	188	132	141	146	126	204
Hours of Service Act	40	43	6	19	6	8	1	11	1	2
Other	53	38	73	52	82	90	93	106	146	189
Contract actions:										
Negotiable instruments	1, 645	1, 925	2, 253	2, 057	2, 589	4, 211	3, 418	3, 713	4, 271	5, 954
Bail bonds and surety bonds	121	92	81	77	111	69	75	89	59	82
Other	190	224	332	526	1, 346	1, 984	1, 300	1, 477	2, 624	2, 952
Real property actions	609	374	472	486	478	833	613	744	632	672
Tort actions	246	244	222	152	201	336	227	260	339	358
Tax suits	66	91	64	77	94	72	77	117	215	217
Admiralty suits	60	82	60	55	62	69	40	47	55	31
All other	112	169	262	116	185	115	163	190	136	146

TABLE I.—*Civil cases commenced in the United States district courts during the fiscal years 1945–54, by basis of jurisdiction and nature of suit*—Continued

Basis of jurisdiction and nature of suit	Number of cases									
	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954
UNITED STATES CASES—Continued										
United States defendant	3,935	5,257	5,797	5,230	4,988	4,508	4,327	5,109	6,130	4,892
Enjoining Federal agencies	446	491	422	478	827	669	743	1,286	1,955	853
Habeas corpus:										
Deportation	72	421	260	193	225	217	239	346	323	302
Other	567	470	501	610	563	477	487	480	417	466
Contract actions:										
Insurance—war risk	55	71	159	220	214	221	216	188	161	132
Other	139	143	125	249	310	236	293	152	198	143
Motion to vacate sentence					102	112	79	90	119	266
Real property actions	94	142	139	82	73	71	131	96	93	100
Tort actions:										
Jones Act	14	9								
Federal Tort Claims Act:										
Personal injury, motor vehicle			423	498	403	381	331	359	528	516
Personal injury, other			149	465	180	228	230	268	229	254
Personal property damage			87	155	586	395	131	173	172	206
Real property damage			17	385	80	54	44	74	159	89
Other tort	48	56	81	63	46	63	13	13	5	1
Tax suits	463	429	449	504	623	899	1,025	1,063	1,054	867
Admiralty suits	2,021	2,994	2,951	1,305	731	470	349	504	701	599
All other	16	31	34	23	25	15	16	17	16	8
PRIVATE CASES										
Federal question	3,613	5,222	9,375	6,986	6,575	6,775	6,474	7,663	8,982	7,547
Copyright	133	149	176	248	128	165	146	195	201	210
Employers' Liability Act (railroads)	414	669	803	1,038	944	1,085	1,133	1,233	1,319	1,284
Fair Labor Standards Act	623	1,166							218	183
"Portal to portal"			2,239	44	13	5	13	2		
Other			1,290	752	265	241	239	223		
Habeas corpus	537	492	485	543	584	560	482	541	549	598
Jones Act—personal injury to seamen	384	452	1,607	1,574	1,620	1,718	1,734	2,227	2,463	2,253
Miller Act—subcontractors of United States	236	151	66	81	88	114	117	245	269	440
Patent	229	303	372	479	563	699	591	525	562	584
Antitrust laws	27	68	64	78	162	157	209	261	212	163
Bankruptcy	70	47	112	201	201	308	362	238	317	245
Banks and banking									1,369	236
Civil Rights Act	29	40	52	116	117	142	126	166	126	162
Constitutionality of state statutes	58	30	40	52	42	50	32	23	23	37
Freight rates (ICC)	222	167	188	218	297	275	203	198	226	249
National bank receivers	35	9	3	2	2		4	1		
Price control—OPA	389	957	1,095	959						
Rent control—OHE					1,046	634	528	499	500	248
Perishable Commodities Act	15	14	33	34	20	24	28	26	26	33
Railway Labor Act	10	15	34	34	29	49	34	36	42	42
Trade-mark	91	107	155	157	157	206	165	182	196	197
Defense Production Act, 1950							3	24	32	4
Labor-Management Relations Act									182	211
All others	111	386	561	376	297	343	325	818	150	168

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TABLE I.—*Civil cases commenced in the United States district courts during the fiscal years 1945–54, by basis of jurisdiction and nature of suit*—Continued

Basis of jurisdiction and nature of suit	Number of cases									
	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954
PRIVATE CASES—Continued										
Diversity of citizenship	5,282	6,273	8,615	19,818	12,347	13,124	13,490	15,135	17,383	18,615
Contract actions:										
Insurance	1,102	1,269	1,456	1,762	1,953	2,186	2,049	2,383	2,761	3,132
Negotiable instruments	47	39	74	134	146	181	160	143	170	253
Breach of warranty	26	47	77	116	123	97	97	87	97	119
Other	972	1,111	1,665	2,137	2,309	2,398	2,302	2,263	2,599	2,986
Real property actions:										
Foreclosure	20	22	18	16	36	66	24	23	34	44
Other (except torts)	219	231	296	339	437	383	378	381	383	384
Tort actions:										
Personal injury, motor vehicle	1,040	1,369	2,114	2,916	3,707	3,958	4,752	5,756	6,865	6,919
Personal injury, other negligence	1,311	1,515	2,065	2,213	2,327	2,541	2,505	2,795	3,051	3,318
Personal property damage, negligence	56	65	107	147	193	199	197	210	224	218
Real property damage—all	84	163	141	266	211	294	265	293	341	313
Personal injury, nonnegligence	151	167	229	289	333	316	325	319	322	337
Personal property damage, nonnegligence	122	154	203	283	280	264	277	326	371	409
All other	132	121	170	200	292	241	159	156	165	183
Admiralty	1,231	1,265	1,782	3,235	3,080	2,757	2,550	2,764	3,223	2,947
Cargo damage	411	327	551	1,535	1,237	1,057	920	1,082	1,521	1,106
Other contract	264	341	474	676	669	621	532	511	519	592
Collision of ships	269	243	227	244	302	258	259	264	298	281
Other negligence	114	108	100	132	134	118	122	130	141	136
Limitation of liability	45	53	49	62	55	61	83	82	87	67
Personal injury	80	120	256	370	413	415	425	535	524	627
Salvage	13	19	23	39	41	29	36	37	17	29
Wage suits	28	34	86	150	218	179	163	114	108	103
All other	7	20	16	27	11	19	10	9	8	6
General local jurisdiction	7,729	9,381	9,350	9,305	9,384	9,537	9,662	9,986	10,532	10,403
Contract actions	342	380	488	738	870	914	877	880	999	1,222
Real property actions	276	389	498	466	498	472	557	526	662	571
Tort actions:										
Personal injury, motor vehicle	253	357	497	551	623	721	783	806	944	945
Personal injury, other negligence	181	208	226	368	417	449	457	475	459	482
Personal property damage, negligence	4	6	2	9	9	16	25	27	39	30
Real property damage—all	4	15	9	14	13	21	13	30	40	30
Personal injury, nonnegligence	81	82	142	147	149	177	167	156	181	151
Personal property damage, nonnegligence	19	30	31	30	24	43	49	37	25	43
Divorce and maintenance	3,636	4,889	3,924	3,495	3,501	3,519	3,583	3,817	3,846	3,588
Insanity	1,728	1,787	2,220	2,344	2,200	2,105	1,997	2,064	1,994	1,975
Probate	281	249	281	123	125	118	115	108	92	114
Adoption and guardianship	281	341	457	432	491	468	438	443	508	522
All other	643	648	575	588	464	514	601	617	743	730

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TABLE II.—*Source of appeals and original proceedings commenced in the U. S. Courts of Appeals for the fiscal years 1945–54*

District and board	1945	1946	1947	1948	1949	1950	1951	1952	1953	1954
Total appeals	2,730	2,627	2,615	2,758	2,989	2,830	2,982	3,079	3,226	3,481
United States district courts	2,123	2,149	2,155	2,268	2,405	2,252	2,286	2,366	2,494	2,676
Other courts	45	39	40	46	50	38	51	44	28	39
Boards and commissions	511	418	400	381	491	485	566	610	639	659
Tax Court of the United States	331	267	216	244	233	239	238	257	252	271
Civil Aeronautics Authority	3		4	8	15	17	18	21	8	12
Federal Alcohol Administration	10	7	1	1			2	1	1	2
Federal Communications Commission	4	3	13	10	18	14	4	8	13	34
Federal Power Commission	4	5	9	12	15	12	12	24	21	15
Federal Security Agency	3		1	1			1	1	3	
Federal Trade Commission	26	4	8	9	6	8	38	20	25	11
National Labor Relations Board	108	107	124	63	172	167	236	244	285	294
Processing Tax Board of Review	1								1	
Secretary of Agriculture	1		2	4	1	1	2	1	3	
Securities and Exchange Commission	15	11	8	13	6	6	3	10	4	5
Wages and Hours Administration					1			1		1
Board of Tax Appeals (District of Columbia)	5	14	12	13	14	9	8	16	16	7
All other boards and commissions			2	3	10	12	4	6	7	7
Original proceedings	51	21	20	63	43	55	79	59	65	107

TABLE III.—*Nature of suit of civil appeals from the United States district courts filed in the U. S. Courts of Appeals for fiscal years 1947–54*

Nature of suit	1947	1948	1949	1950	1951	1952	1953	1954
Total cases	1,631	1,795	1,962	1,822	1,849	1,857	1,919	1,999
United States cases	770	677	791	708	677	724	815	875
United States plaintiff:								
Condemnation of land	42	43	24	10	27	18	22	31
Price control and rationing—OPA	183	85	87	56	51	47		
Price and rent control							36	26
Fair Labor Standards Act	24	15	13	7	4	12	13	24
Other enforcement:	23	37	30	21	34	18	25	21
Food and Drug Act	10	5	3	8	14		2	4
Liquor Laws	10	5	4	8	7	18	7	15
Other forfeitures	4	9	12	10	3	15		
Other forfeitures and penalties							28	8
Negotiable instruments	4	2	7	5	4	4	8	6
Other contracts	14	9	9	16	15	26	37	22
All other	57	37	34	22	30	39	49	41
United States defendant:								
Review or enjoin Federal agencies								181
Contract actions							52	35
Habeas corpus	146	130	188	115	96	84	88	107
Motion to vacate sentence				101	40	58	97	99
Tort Claims Act		43	48	51	32	49	46	71
Tax suits	93	80	90	73	89	102	109	144
Admiralty							22	23
All other	160	177	242	205	231	234	174	17

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TABLE III.—*Nature of suit of civil appeals from the United States district courts filed in the U. S. Courts of Appeals for fiscal years 1947–54*—Continued

Nature of suit	1947	1948	1949	1950	1951	1952	1953	1954
Private cases	861	1,118	1,171	1,114	1,172	1,133	1,104	1,124
Federal question:								
Antitrust	.....	.....	.....	.....	.....	.....	41	28
Civil rights	.....	.....	.....	.....	.....	.....	26	19
Copyright	6	8	4	3	12	6	9	3
Employers' Liability Act	33	37	34	24	24	27	34	27
Fair Labor Standards Act	58	113	82	17	19	16	8	7
Habeas corpus	55	43	74	70	40	63	49	49
Jones Act—personal injury to seamen	10	24	12	21	25	22	26	19
Labor Management Relations Act	.....	.....	.....	.....	.....	.....	.....	19
Miller Act (subcontractors of United States)	2	7	7	2	2	3	5	5
Patent	58	63	76	74	82	77	80	74
Railway Labor Act	.....	.....	.....	.....	.....	.....	14	8
Trade-mark	.....	.....	.....	.....	.....	.....	13	15
All other	130	165	154	136	148	142	58	54
Diversity of citizenship:								
Insurance	55	74	85	80	96	83	76	89
Other contracts	128	158	179	195	195	177	197	189
Real property	34	51	71	62	56	64	46	49
Personal injury—motor vehicle	38	71	44	78	73	93	105	105
Personal injury—other	58	64	72	72	94	88	76	94
All other	54	64	58	76	78	64	70	69
Admiralty	45	43	64	52	61	60	68	64
General local jurisdiction:								
Contract actions	23	29	42	46	36	35	14	28
Real property actions	7	21	25	26	14	23	12	13
Tort actions	20	41	41	35	48	41	36	51
Divorce and maintenance	15	16	13	17	23	15	14	16
Probate	11	11	18	9	16	8	11	5
All other	21	15	16	19	30	26	16	25

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TAGORE LECTURES

IV

Legislative Prerogatives

India and America both have the parliamentary tradition of protecting the legislative process against interference from the outside, of granting members of the legislative branch immunity for what they do and say, of entrusting to the legislative branch the management of its affairs.

I have discussed in an earlier Lecture the exclusive control which each House of the American Congress has over the seating of rival candidates.

As respects legislative immunity the United States Constitution provides in Article I, Section 6:

"The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The exception for "treason, felony and breach of the peace" has been held to exclude from the privilege all arrests for criminal offenses. *Williamson* v. *United States*, 207 U. S. 425. The privilege against arrest is therefore practically obsolete, since it applies only to arrests in civil suits, which are no longer common in

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America. It does not confer immunity from service of process, *Long* v. *Ansell*, 293 U. S. 76.

The provision against requiring members of Congress to answer for any speech or debate is an ancient one. This right derived from the great Parliamentary struggle that went on in England in the sixteenth and seventeenth centuries over the prerogatives of members of Parliament. The right of freedom of speech in Parliament, defended by Peter Wentworth, John Elliot, and other unsung heroes, and finally engrossed in the English Bill of Rights of 1689, was firmly established in America by the time the Constitution was adopted. It has been liberally construed. Suffice it here to point out that the Court in *Kilbourn* v. *Thompson*, 103 U. S. 168, stated:

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." *Id.*, 204.

The Indian Constitution also provides for Parliamentary immunity. Article 105 states in part:

"(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

"(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

"(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members

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and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution."

Article 122 (2) provides:

"No officer or member of Parliament in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers."

Articles 194 and 212 (2) contain similar provisions for the legislatures of the States.

The application of these doctrines is illustrated by *Misra* v. *Nandakisore*, 40 A. I. R. 111, and *Singh* v. *Govind*, 41 A. I. R. 319.

In the *Misra* case, the High Court of Orissa was presented with a protest from a member of the state assembly, challenging the action of the Speaker in disallowing certain questions. The court declined to interfere.

In the *Singh* case, a member of the state legislature asked the High Court of Allahabad to pass on certain disciplinary action which had been taken against him. In dismissing the case, the opinion of Justice Sapru explained:

"Obviously, this Court is not, in any sense whatever a Court of appeal or revision against the legislature or against the rulings of the Speaker who, as the holder of an office of the highest distinction, has the sole responsibility cast upon him of maintaining the prestige and dignity of the House." *Id.*, 327.

Justice Sapru referred to the rights of the British Parliament and to Article 194, as including the rights (1) to be the exclusive judge of the legality of its own proceedings, (2) to punish its members for their conduct in Parliament, and (3) the right to settle its own proceedings.

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In America, the most controversial problems touching on legislative prerogatives arise out of the power of Congress to conduct investigations.

This power, asserted from the very beginning, is not an express grant. It is implied from Article I, Section 1 of the Constitution granting "all legislative powers" to the Congress and from Article I, Section 5 which provides that each House "may determine the Rules of its Proceedings."

The power to investigate serves four main legitimate and important ends: first, it gives Congress information and data as the basis for new legislation; second, it gives Congress valued information concerning the way old laws are being executed and the problems arising in connection with their administration, whether fiscal or other; third, it is used to develop facts with which to judge the qualifications and conduct of members of Congress; fourth, it is used for the development of information in impeachment proceedings.

The power to investigate is an implied power often vital to the exercise of other powers of the Congress. *Anderson* v. *Dunn*, 6 Wheat. 204; *McGrain* v. *Daugherty*, 273 U. S. 135. As the Court in the *Daugherty* case said: ". . . the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *Id.*, 174.

Committees of Congress have conducted investigations from the beginning. More than 1,000 congressional investigations of all types have been carried on since 1789. At least five hundred of them have been conducted since 1925. The first congressional investigation was conducted in 1792 by a select committee of the House of Representatives into the defeat of General St. Clair by American Indians.

The House took the lead in these investigations during the nineteenth century. But the Senate played the main role of inquisitor during the twentieth century. Congress never doubted that it had the authority to authorize its

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committees to carry on various inquiries. Precedents for the exercise of this power existed in the time-honored practice of the British Parliament—long regarded as the grand inquest of the Nation—as well as in the practice of the colonial legislatures.

The roots of the investigative function are deep in the ancient practice of the British Parliament. The journal of the House of Commons contains references in the early years of the seventeenth century to the creation of investigating committees to resolve election contests and discover data for proposed legislation. Parliament's power over the purse also gave rise to the institution of committees to ascertain whether appropriated funds had been spent for authorized purposes. The real use of parliamentary committees as essential tools of the legislative process dates from 1688, when Parliament achieved supremacy in the British system of government. "In 1689 a host of committees are to be found in existence, authorized to investigate in broad reaches the operations of government . . . . The extensive utilization of this device came as a consequence of a fuller pursuit of legislative powers by Parliament. Forty years later it appears as a common instrument of the legislative process." * In the words of Lord Coke, the Commons were "the general inquisitors of the realm."

Legislative investigations were the product not only of centuries of British parliamentary history, but also of decades of colonial practices. For the representative assemblies of the American colonies inherited the practices and powers of the House of Commons; ** and likewise the state legislatures carried on the heritage by making use of committees of inquiry and giving them power to send for persons and papers.***

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*Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 162–163.

**Potts, Power of Legislative Bodies to Punish for Contempt, 74 U. of Pa. L. Rev., p. 691 (1926).

***Landis, *op. cit.*, pp. 166–167.

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When challenged, the investigative powers exercised by state legislatures were upheld by the state courts. For example, in the New York case of *Briggs* v. *Mackellar*, 2 Abb. Prac. 30, 56–57, decided in 1855, the Court said:

"It is a well-established principle of this parliamentary law, that either house may institute any investigation having reference to its own organization, the conduct or qualifications of its members, its proceedings, rights, or privileges, or any matter affecting the public interest upon which it may be important that it should have exact information, and in respect to which it would be competent for it to legislate. The right to pass laws, necessarily implies the right to obtain information upon any matter which may become the subject of a law. It is essential to the full and intelligent exercise of the legislative function . . . . In American legislatures the investigation of public matters before committees, preliminary to legislation, or with the view of advising the house appointing the committee, is, as a parliamentary usage, as well established as it is in England, and the right of either house to compel witnesses to appear and testify before its committees, and to punish for disobedience, has been frequently enforced. . . ."

The importance of English precedents in the development of the investigative power of Congress has been recognized by American scholars. "Investigating committees have a foundation in Parliamentary custom which rivals the antiquity of most practices still forming a part of the procedure of Parliament or of Congress. The basis of the exercise of the investigative power in both cases therefore is found in custom rather than in a right specifically created by constitutional or statutory provision. The original use and continued exercise of the power were found necessary for legislative self-survival and for efficient legislation . . . . There can be no question that Congress adopted the investigative function and

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that the scope of its exercise was largely determined by reference to English precedents . . . ." *

In America, investigations have been made by both standing and select committees. Inquiries have frequently been entrusted to select committees because of their independence and zeal. Lately, however, greater reliance for the conduct of investigations has been placed upon standing committees and their subcommittees.

A House of the Congress has the power to arrest a recalcitrant witness and bring him before the Bar of the House or before its committee, requiring him to answer. *McGrain* v. *Daugherty*, 273 U. S. 135; *Barry* v. *Cunningham*, 279 U. S. 597.

Congress has the corollary power to punish the contumacious witness by holding him in contempt. *In re Chapman*, 166 U. S. 661; *Jurney* v. *MacCracken*, 294 U. S. 125. The power may be exercised not only to compel production of papers or the giving of testimony but also *qua* punishment. Thus, the witness who delivers all the papers in his possession, having first refused to do so, may still be punished for contempt by a House of the Congress. *Jurney* v. *MacCracken*, 294 U. S. 125. As the Court said, ". . . where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance." *Id.*, 148. Obedience to the subpoena by delivery of the papers is only a consideration "for the discretion of the legislators in meting out the punishment." *Id.*, 149. But the power of Congress to punish for contempt is limited to committing the witness to jail for a period not exceeding the current Congress. See *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *Marshall* v. *Gordon*, 243 U. S. 521, 542; *United States* v. *Bryan*, 339 U. S. 323, 327. As the spon-

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*Dimock, Marshall E. *Congressional Investigating Committees* (1929), pp. 46–47.

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sor of the 1857 Act (shortly to be discussed) said in the debates on the floor of the House, "Your power to punish for any contempt committed against the authority of the body of which you are members, expires unquestionably when the commission of the members constituting that body expires." Cong. Globe, 34th Cong., 3d Sess., pp. 405–406.

The 1857 Act made the contumacy of a witness before a congressional committee a misdemeanor punishable by fine and imprisonment after trial before a federal court. 11 Stat. 155. The constitutionality of this law has been sustained against the claim that it is double jeopardy to make a statutory offense out of what may also be an offense punishable by contempt. *In re Chapman*, 166 U. S. 661; *Jurney* v. *MacCracken*, 294 U. S. 125, 151.

The power of Congress to punish for contempt and the power of the United States to prosecute witnesses for contumacy having been settled, modern controversies relate to other matters.

Foremost is the scope of the authority of a committee in a given situation to demand an answer to a specific question. The character of the offense presents a justiciable issue. The question when a committee is within the field of its competence and when it invades private matters beyond its domain has presented troublesome issues. *Kilbourn* v. *Thompson*, 103 U. S. 168.

The Committee may not usurp judicial functions, taking over the administration of matters before a court. Yet, any intimations of the *Kilbourn* case to the contrary notwithstanding, it would not seem beyond the competence of the committee to examine into matters already before a court where the aim was not to supplant the judicial processes nor to prejudice them, but to prepare the way for corrective legislation.

The committee, it would seem, may not use its investigative power to serve the function of impeachment proceedings of federal judges, which are governed by the special procedure provided in Article I, Section 3 of the

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Constitution. That was the view recently expressed by a group of federal judges in California. It appears that a congressional committee, which was investigating grand jury proceedings, subpoenaed a federal judge to ask him questions concerning his conversations with the foreman of a grand jury. The federal judges were of the view that a federal grand jury was part of a "judicial proceeding" and that the conduct of a federal judge in a "judicial proceeding" was beyond the competence of Congress to inquire into, except in impeachment proceedings. The judges replied to the committee as follows:

". . . The judges signing below, being all the judges of the court, are deeply conscious, as must be your committee, of the constitutional separation of functions among the executive, legislative, and judicial branches of the Federal Government. This separation of functions is founded on the historic concept that no one of these branches may dominate or unlawfully interfere with the others.

"In recognition of the fundamental soundness of this principle we are unwilling that a judge of this court appear before your committee and testify with respect to any judicial proceeding. The Constitution of the United States does not contemplate that such matters be reviewed by the legislative branch, but only by the appropriate appellate tribunals. The integrity of the Federal courts, upon which liberty and life depend, requires that such courts be maintained inviolate against the changing moods of public opinion. We are certain that you as legislators have always appreciated and recognized this, and we know of no instance in the history of the United States where a committee such as yours has summoned a member of the Federal judiciary . . . ."

In *Marshall* v. *Gordon*, 243 U. S. 521, the Court held that an attack by a district attorney on a House subcommittee, that was investigating his conduct of litigation, was not of a character to obstruct the legislative process. As the Court stated, the implied power to pun-

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ish for contempt "does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation. . . ." *Id.*, 542. There must be, said the Court, acts such as those of the following character: ". . . physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel." *Id.*, 543.

The letter in question was held not to fall in those categories. It did not obstruct the legislative function but merely irritated the committee or created in the public mind an unfavorable attitude toward the committee. Therefore, it fell beyond the competence of Congress to treat as a contempt of its legislative authority.

A witness may refuse to answer on the ground that the question asked goes beyond the authority of the committee. The question whether it does presents a justiciable issue. The recent case of *United States* v. *Rumely*, 345 U. S. 41, illustrates the point. In that case a congressional committee was authorized to investigate "lobbying activities." One organization, charged with lobbying, was engaged in selling books and other literature of a political nature. The committee asked the secretary of that organization to disclose to it the name of those who made bulk purchases of the books for further distribution. The secretary refused to answer. The committee submitted the matter to the House of Representatives from which all its authority derived and asked that a resolution be adopted certifying the witnesses refusal to answer to the prosecuting attorney for prosecution under the 1857 Act.

The House apparently thought that the inquiry was relevant to the investigation and within the words "lobby-

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ing activities" as used in the Resolution, for it voted that the witness had wrongfully refused to answer. Thereupon, the witness was prosecuted under the 1857 Act and sentenced to fine and imprisonment. The Court held the prosecution to be illegal, as the sale of books was not included in the word "lobbying activities" as used in the original Resolution creating the committee. "Lobbying," said the Court, was used in the Resolution in its "commonly accepted sense" *viz.* "representations made directly to the Congress, its members, or its committees." *Id.*, 47. Selling books was said to be of a different character. Even though the House of Representatives said it was included in "lobbying," the Court said it was not. And the reason why the Court took such an extreme position was that, if selling books were included in lobbying, grave constitutional issues would be presented. As the concurring Justices, who saw no alternative to acceptance of the House's construction of its own Resolution, said:

"If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship. A publisher, compelled to register with the Federal Government, would be subjected to vexatious inquiries. A requirement that a publisher disclosed the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. True, no legal sanction is involved here. Congress has imposed no tax, established no board of censors, instituted no licensing system. But the potential restraint is equally severe. The finger of government leveled against the press is ominous. Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable

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pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the menace of the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law. The power of investigation is also limited." *Id.*, 57–58.

As indicated by the concurring Justices in the *Rumely* case, the power of investigation is not unlimited. Some questions may trench on the freedom of speech, freedom of press, freedom of conscience. Qualifications on the authority have always been assumed. Thus in *McGrain* v. *Daugherty*, 273 U. S. 135, the Court stated there were two propositions conditioning and qualifying the investigative power: "One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied." *Id.*, 173–174.

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In America numerous exceptions press for recognition along the periphery of the law as it has been expounded. It is too early to know the shape of things to come.

Lower courts* have reached further into the problem than the Supreme Court. Thus in *Barsky* v. *United*

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*In *United States* v. *Josephson*, 165 F. 2d 82, the Court of Appeals sustained a conviction of a person who refused to be sworn and to testify before a House Committee on Un-American Activities. A main contention was that the inquiry, which was into un-American propaganda instigated from home or abroad, abridged the right of witnesses to freedom of speech. The court, speaking through Judge Chase, rejected the argument:

"The appellant's argument runs counter to the very purpose of the First Amendment. The power of Congress to gather facts of the most intense public concern, such as these, is not diminished by the unchallenged right of individuals to speak their minds within lawful limits. When speech, or propaganda, or whatever it may at the moment be called, clearly presents an immediate danger to national security, the protection of the First Amendment ceases. Congress can then legislate. In deciding what to do, however, it may necessarily be confronted with the difficult and complex task of determining how far it can go before it transgresses the boundaries established by the Constitution. . . .

". . . It is not for the courts to assume in advance that Congress will pass any legislation in violation of the First Amendment. . . . Rather, the courts are to presume, until the contrary appears, that Congress will fulfill its obligation to defend and preserve the Constitution.

"Thus the only real basis for the appellant's contention seems to be that in some way the First Amendment in protecting freedom of speech guaranties such privacy in speaking as the particular speaker may desire, and that this privacy is violated by whatever disclosure occurs incidental to an investigation for legislative purposes. This is a fallacy essentially based upon the idea that the Constitution protects timidity." *Id.*, 91–92.

Judge Charles E. Clark said in dissent:

"I have not dwelt upon the question whether the Committee's activities, being in form directed only to investigation of words and acts after they have taken place, can nevertheless be considered an abridgment of the freedom of speech. For it is too well established now for question that our Constitution does not follow the earlier English view of penalties after the event for such curtailment, but

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States, 167 F. 2d 241, the Court of Appeals for the District of Columbia upheld the authority of a House Committee to investigate subversive and un-American propaganda against the objection that the investigation probes political opinions in violation of the First Amendment. The majority gave broad constitutional leeway to the investigative function:

"Preliminary inquiry has from the earliest times been considered an essential of the legislative process. By it are to be determined both the advisability for and the content of legislation. So that even as to ordinary subjects, the power of inquiry by the legislature is coextensive with the power of legislation and is not limited to the scope or the content of contemplated legislation. Constitutional legislation might ensue from information derived by an inquiry upon the subject described in the quotation from H. R. Res. No. 5. That potentiality is the measure of the power of inquiry. The fact is that at least eight legislative proposals have been submitted to the Congress by this Committee as the result of its investigations. Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry; invalid legislation might ensue from any inquiry." *Id.*, 245.

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does prohibit any acts tending to prevent persons from exercising that broadly important right. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; *Bridges* v. *California*, supra. Here there can be no doubt of that intended and actual consequence of the investigation. The Committee announces its desire that the persons it finds guilty shall forfeit their jobs in public and private industry and shall be subject to prosecution for any collateral crimes which may have been disclosed, and generally shall be exposed pitilessly to public condemnation. That it is successful in its purpose the daily papers show. There can be no doubt of the obvious and direct abridgment of the right freely to speak and express one's opinions which is thus achieved." *Id.*, 100.

The Supreme Court denied certiorari. 333 U. S. 838.

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Judge Edgerton wrote in dissent:

"That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak. . . .

"The Committee and its members have repeatedly said in terms or in effect that its main purpose is to do by exposure and publicity what it believes may not validly be done by legislation. This is as much as to say that its purpose is to punish or burden propaganda. . . .

"What Congress may not restrain, Congress may not restrain by exposure and obloquy. If it be thought that the Committee's purpose does not include 'punishment, in the ordinary sense,' this is immaterial to the present point. The First Amendment forbids Congress purposely to burden forms of expression that it may not punish. . . .

"The premise that the government must have power to protect itself by discovering whether it is in clear and present danger of overthrow by violence is sound. But it does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world, on topics ranging from communism, however remotely and peaceably achieved, to the 'American system of checks and balances,' the British Empire, and the Franco government of Spain." *Id.*, 255, 256, 259.

Australia has approached the problem quite differently. In *Colonial Sugar Refining Co.* v. *Attorney General*, 15 C. L. R. 182, the High Court was divided on whether the Parliament had power to make laws for the compulsory examination of witnesses by Royal Commissions, touch-

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As the Court, speaking through Chief Justice Warren, recently id in Quinn v. United States , 348 U.S._____,

"But the power to investigate, broad as it may be, is also bject to recognized limitations. It cannot be used to inquire into ivate affairs unrelated to a valid legislative purpose. Nor does extend to an area in which Congress is forbidden to legislate. milarly, the power to investigate must not be confused with any of e powers of law enforcement; those powers are assigned under our nstitution to the Executive and the Judiciary. Still further limi- tions on the power to investigate are found in the specific individual arantees of the Bill of Rights, such as the Fifth Amendment's ivilege against self-incrimination * * *."

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ing on matters that may not be reached by the legislative power of the Parliament, in absence of an amendment to the Constitution. The Privy Council held that the investigative power being incidental to the exercise of enumerated powers, does not extend to matters which might some day be under the jurisdiction of the Parliament but which presently are not. *Attorney General* v. *Colonial Sugar Refining Co.*, [1914] A. C. 237.

While the American courts have not spoken with finality on the reach of the investigative power, it is clear that the power, being derived from the Constitution, rises no higher than its source, and even in its limited sphere exists only insofar as it is congenial to other constitutional rights and guarantees. Its exercise in a given situation must be judged and appraised in light of the Constitution as an organic whole.

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An illustration arises from the action of the House Committee on Un-American Activities. It served ex-President Harry Truman with a subpoena to appear before it to testify regarding the employment and promotion of a man (then dead) in the Executive Department, whose loyalty had been impugned. President Truman replied to the Chairman of the Committee as follows:

A dramatic episode recently arose out of

"I have your subpoena dated Nov. 9, 1953, directing my appearance before your committee on Friday, Nov. 13, in Washington. The subpoena does not state the matters upon which you seek my testimony, but I assume from the press stories that you seek to examine me with respect to matters which occurred during my tenure of the Presidency of the United States.

"In spite of my personal willingness to cooperate with your committee, I feel constrained by my duty to the people of the United States to decline to comply with the subpoena.

"In doing so, I am carrying out the provisions of the Constitution of the United States; and am following a long line of precedents, commencing with George Washington himself in 1796. Since his day, Presidents Jeffer-

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son, Monroe, Jackson, Tyler, Polk, Fillmore, Buchanan, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, Hoover and Franklin D. Roosevelt have declined to respond to subpoenas or demands for information of various kinds by Congress.

"The underlying reason for this clearly established and universally recognized Constitutional doctrine has been succinctly set forth by Charles Warren, one of our leading Constitutional authorities as follows:

" 'In this long series of contests by the Executive to maintain his Constitutional integrity, one sees a legitimate conclusion from our theory of government. . . . Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. . . . Defense by the Executive of his Constitutional powers becomes in very truth, therefore, defense of popular rights—defense of power which the people granted to him.

" 'It was in that sense that President Cleveland spoke of his duty to the people not to relinquish any of the powers of his great office. It was in that sense that President Buchanan stated the people have rights and prerogatives in the execution of his office by the President which every President is under a duty to see 'shall never be violated in his person' but 'passed to his successors unimpaired by the adoption of a dangerous precedent.' In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself but the people.'

"President Jackson repelled an attempt by the Congress to break down the separation of powers in these words:

" 'For myself I shall repel all such attempts as an invasion of the principles of justice as well as of the Constitution, and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish Inquisition.'

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"I might commend to your reading the opinion of one of the committees of the House of Representatives in 1879, House Report 141 March 3, 1879, Forty-fifth Congress, Third Session, in which the House Judiciary Committee said the following:

" 'The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his actions, or the action of his officers against his consent, any more than he can call for any of the journals or records of the House or Senate.'

"It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.

"The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

"If your intention, however, is to inquire into any acts as a private individual either before or after my Presidency and unrelated to any acts as President, I shall be happy to appear."

The issue did not come to a head in the courts. But there can be little doubt that the tradition of which President Truman spoke is deeply imbedded in our constitutional system and compatible with, if not necessary to, the system of checks and balances on which our government is based.

The investigative power has been limited in practice by the refusal of the President to furnish information requested by investigating committees, where disclosure would, in his judgment, not be compatible with the public interest. At least 18 Presidents have refused congressional

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In United States v. Cotton Valley Operators, 9 F.R.D. 719, the ourt ordered the United States to produce certain documents, including .B.I. reports, for inspection of the defendants. The Government eclined to produce the documents, claiming they were privileged. The ourt held that this was a matter for it to decide, after examining he documents. Upon the Government's refusal to comply, the action as dismissed. The Supreme Court affirmed, by an equally divided Court nd without opinion. 339 U.S. 940. See The Power of Congress to ubpoena Members and Documents from the Executive Branch by J. Austin atimer, 7 South Carolina L.Q. 379.

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demands for executive papers. A recent example of such refusal was President Truman's executive order in 1948 restricting access to the files of the Federal Bureau of Investigation. 13 Fed. Reg. 1359. Presidents of the United States have withheld information of Executive departments or agencies whenever it was found that the information sought was confidential or that its disclosure would be incompatible with the public interest or would jeopardize the safety of the nation.

The power of Congress to investigate the Executive branch is, of course, clear. The extent to which that may be defeated by the withholding of information on the ground that its disclosure would be harmful to the public interest is one of the contentious problems in current legal developments. It can only be resolved case by case, generalizations being difficult. That there is leeway for Executive discretion is illustrated by *Touhy* v. *Ragen*, 340 U. S. 462, which, though not involving a congressional investigation, illustrates the principle. A prisoner challenged his confinement by habeas corpus and demanded production of papers in the files of the Department of Justice claiming they would show his conviction was brought about by fraud. The District Court held an official of the Department in contempt for refusal to produce them. The official acted pursuant to the command of the Attorney General who kept the documents secret under a general order which he had promulgated making all "official files, documents, records and information" of the office of Attorney General "confidential." A divided Court held the withholding proper and not an unconstitutional invasion by the Executive of the sphere of the Judiciary. The case is a close one, and if carried very far, the judicial function could be thwarted.

The separate domain of each Branch is often difficult to divine. Certainly the Executive has some exclusive control over its affairs. It would, for example, be unthinkable that a congressional committee could subpoena

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from the President the files relating to a diplomatic mission.

The practical bounds of legitimate inquiry are determined not so much by legal rules but by the respect that one department has for the other. The American political creed rests on the sovereignty of good-will. The departments by and large operate with high respect for the other's functions. As stated by a recent Senate Report on the Congressional Power of Investigation, "In exercising its authority, Congress of necessity will be guided by good judgment and expediency, giving due consideration to the nature of the inquiry, the state of public and international affairs, and the general welfare of the country." S. Doc. No. 99, 83d Cong., 2d Sess., p. 27.

Congressional investigating committees empowered to compel testimony do not in practice feel bound by the principles or precedents of courts of law regarding the giving of testimony by witnesses before them. There are no standing rules or regulations governing procedure in committee hearings. Each committee undertakes to determine its own procedure and often assumes that the witness appearing before it has no inherent right either to give evidence in his own behalf or to be advised by counsel or to cross-examine his accusers.*

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* "Despite the fact that investigating committees are not expected to follow the rules of a law court, it appears nevertheless inexcusable to gather a mass of accusatory statements from witnesses, many of whom are prone to be actuated by malice or given to easy gossip, without later or at the time giving the party accused or other witnesses opportunity to come face to face with accusing witnesses, who may be interrogated by the accused's counsel.

"The immediate rejoinder is that an investigation is not a trial, and that if cross-examination is desired the case can be brought before a court of competent jurisdiction, permitting an adequate defense. But what, it may be asked, is the purpose of hearings before investigating committees? Is their purpose vindictive, ex parte, a consuming passion to establish evidence of guilt at all costs? Or is it rather to examine the facts of the particular case, pro and

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There has been a growing tendency in recent years, however, to allow witnesses greater liberty to consult counsel. Although investigations are not criminal proceedings, the only privilege which Congress has generally tended to recognize is that guaranteed by the Fifth Amendment to the Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

This privilege against self-incrimination is not limited to a defendant in a criminal case. It extends also to witnesses in criminal or civil proceedings. *McCarthy* v. *Arndstein*, 266 U. S. 34.

Testimony can be compelled under compulsion of law. But to do so, it is necessary to afford the witness complete immunity from subsequent federal prosecutions for any offenses concerning which ~~they~~ may testify. *Counselman* v. *Hitchcock*, 142 U. S. 547.* A witness, who is granted

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con, enabling the committee to render a judicious report to an assembly requiring unbiased facts?

"If the purpose is the latter, then witnesses should be permitted to confront the accuser, and cross-examination should be frankly permitted." Dimock, *Congressional Investigating Committees* (1929), p. 161.

**United States* v. *Bryan*, 339 U. S. 323, involved 18 U. S. C. § 3486 which provides in part that "No testimony given by a witness before . . . any committee of either House . . . shall be used as evidence in any criminal proceeding against him ~~an~~ any court, except in a prosecution for perjury committed in giving such testimony." Nevertheless the Court held that where a witness had given some testimony before a committee and balked at producing books, the testimony given could be used in a prosecution under the 1857 Act. The Court said:

"It is now contended that the protection of the statute, which was extended to witnesses in an effort to *obtain* testimony, protects equally the person who wilfully *withholds* testimony and is prosecuted for his wilful default. This contention completely ignores the purpose of the immunity. In the first place, it imputes to Congress the contradictory and irrational purpose of granting an immunity from prosecution for contempt in order to obtain evidence of that contempt. And in the second place, it assumes that Congress had some purpose to

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that immunity, may then not refuse to answer on the ground that his testimony will incriminate him ~~under state law.~~ *United States* v. *Murdock*, 284 U. S. 141. It has even been held, though by a divided Court, that the Fifth Amendment does not forbid use in a federal criminal case of self-incriminating testimony previously compelled under a state immunity statute, without participation by federal officers, in a state court proceeding. *Feldman* v. *United States*, 322 U. S. 487.

The privilege affords a broad protection. *Blau* v. *United States*, 340 U. S. 159, involved a witness who refused to testify concerning her connection with the Communist Party. A federal statute made it a crime to advocate knowingly the overthrow of the Government by force or violence, or to assist in organizing a group which advocated such conduct. Therefore, the Court held that her refusal to answer was protected by the Fifth Amendment guarantee, as it would have furnished a link in the chain of testimony needed to convict her under the Act.*

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compel testimony of the kind here involved—statements of refusal by the witness to answer questions or produce documents—in return for which it was willing to grant an immunity. Such an assumption cannot be made. These statements have always been available to the Houses of Congress in contempt proceedings. They are uniformly printed in the reports of committees recommending contempt action and are relied upon by the Houses when deliberating in contempt cases. In short, the purpose of the statute contradicts its application to testimony of this kind.

"Furthermore, to hold such testimony inadmissible in a prosecution for wilful default is to conclude that Congress, for no discernable reason, made proof of contempt vastly more difficult before the courts than in its own chambers, since, as we have indicated, the Houses of Congress themselves are accustomed to rely upon such testimony. There is not a hint of any such purpose in the legislative history of the statute or the decisions construing it." *Id.*, 338–340.

*The Court in *Hoffman* v. *United States*, 341 U. S. 479, 486–487, gave the following instructions to trial judges concerning the scope of the privilege:

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the

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In *Rogers* v. *United States*, 340 U. S. 367, a witness described her connection with the Communist Party and then refused to testify to certain additional details. A divided Court held that, having voluntarily testified to incriminating facts, she could not then refuse to disclose the details. The theory of waiver, on which the majority rested, was challenged by the minority:

"In the case of this petitioner, there is no evidence that she intended to give up her privilege of silence concerning the persons in possession of the Communist Party records. To the contrary, the record—as set out in the Court's opinion—shows she intended to avoid answering the question on whatever ground might be available and asserted the privilege against self-incrimination at the first moment she became aware of its existence." *Id.*, 377.

The minority added:

". . . today's holding creates this dilemma for witnesses: On the one hand, they risk imprisonment for contempt by asserting the privilege prematurely; on the other, they might lose the privilege if they answer a single

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chain of evidence needed to prosecute the claimant for a federal crime. . . . But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. . . . The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' *Temple* v. *Commonwealth*, 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' See Taft, J., in *Ex parte Irvine*, 74 F. 954, 960 (C. C. S. D. Ohio, 1896)." *Id.*, 486–487.

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question. The Court's view makes the protection depend on timing so refined that lawyers, let alone laymen, will have difficulty in knowing when to claim it." *Id.*, 378.

Congress recently enacted the Compulsory Testimony Act (68 Stat. 745) to protect witnesses and to facilitate the obtaining of information by congressional Committees. It is applicable to investigations relating to plans that endanger national security or defense by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of the government by force or violence. It provides that a witness shall not be excused from testifying on the grounds of self-incrimination (1) if a majority of members present of one of the Houses of Congress or, in case of proceedings before a committee, two-thirds of the members of the full committee authorize the witness "to be granted immunity under this section with respect to the transactions, matters, or things concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence by direction of the presiding officer"; and (2) if a federal judge of the district where the inquiry is being carried on has entered an order "requiring said person to testify or produce evidence." A witness, so compelled to testify shall not be "prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is so compelled"; nor shall the testimony which is compelled be used as evidence in any criminal proceeding against him in any court, save for perjury or contempt in giving it.

The policy of the Act reflects the perennial problem of accommodating the constitutional rights of the witness with the need to discover facts relevant to the public welfare.* The importance of protecting the privilege

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*The Senate Report stated:

"The proposed new law is carefully worded so that the witness would not get an 'immunity bath' by the mere fact of testifying. He

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The recent decisions of Quinn v.United States, 348 U.S. _____; pak v. United States , 348 U.S. _____; and Bart v. United States, U.S. _____, indicate the liberal attitude of the Court towards the vilege, As the Court stated in the Quinn case:

"Such liberal construction is particularly warranted in a secution of a witness for a refusal to answer, since the respect mally accorded the privilege is then buttressed by the presumption innocence accorded a defendant in a criminal trial. To apply the vilege narrowly or begrudingly - to treat it as an historical relic, most merely to be tolerated - is to ignore its development and purpose."

The Court went on to say:

"In the instant case, Quinn's references to the Fifth Amendment e clearly sufficient to put the committee on notice of an arent claim of the privilege. It then became incumbent on the mittee either to accept the claim or to ask petitioner whether he in fact invoking the privilege. Particularly is this so if it is e, as the Government contends, that petitioner feared the stigma t might result from a forthright claim of his constitutional right refuse to testify. It is precisely at such times - when the vilege is under attack by those who wrongly conceive of it as ly a shield for the guilty - that governmental bodies must be t scrupulous in protecting its exercise."

The Court went on to hold that the witness, in order to be ecuted for contempt must be "clearly apprised" that "the committee nds his answer notwithstanding his objections." The Court said:

"This requirement - that the committee give a witness a fair risal of its ruling on an objection - recognizes the legitimate rests of both the witness and the committee. Just as the witness

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der 25 (page 2).

ed not use any particular form of words to present his objection, so
o the committee is not required to resort to any fixed verbal
mula to indicate its disposition of the objection. So long as the
ness is not forced to guess the committee's ruling, he has no cause
complain. And adherence to this traditional practice can neither
flict hardship upon the committee nor abridge the proper scope of
islative investigation."

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against self-incrimination in the course of congressional investigations has been the subject of a thoughtful book by Dean Erwin Griswold of Harvard Law School, *The Fifth Amendment Today* (1955). On stressing the importance of the guarantee, he states:

"One way to evaluate a political instrument is to consider what the situation would be if it did not exist. . . . We usually think of the privilege against self-incrimination either in historical terms, in the light of past tyrannies, or in terms of the embarrassment that a witness at a Congressional hearing may experience as a result of the exposure of political mistakes. Let us look, though, at the reverse side of the coin in terms of the standard operating procedures of the police states which have brought the medieval techniques up to date. If we are not willing to let the Amendment be invoked, where, over time, are we going to stop when police, prosecutors, or chairmen want to get people to talk? Lurking in the background here are really ugly dangers which might transform our whole system of free government." *Id.*, 75. — Rider 25

There is another aspect of the activities of congressional committees that may present a justiciable question for the courts. It involves a question concerning the internal organization of the committee and is illustrated by *Christoffel* v. *United States*, 338 U. S. 84. In that case, the petitioner had been convicted of perjury on the basis of his denial of Communist activity during an investigation by a committee of Congress. He contended that

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would have to raise specifically his claim for privilege, and thus put the committee on notice that it was faced with a decision as to whether, for the greater good, the witness should be required to testify (and thereby given immunity with respect to the matters concerning which he testified) or whether it would be better to excuse the witness from testifying, and seek the information elsewhere, in order to preserve possible rights of criminal action against the witness." S. Rep. No. 153, 83d Cong., 1st Sess., p. 2.

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the committee was not a competent tribunal (as required by the perjury statute) at the time of the incident because a quorum was not present. The Court, in reversing the conviction, held that there was an absence of a clear showing of a quorum at the time of the alleged perjured testimony.*

The Court said: "An element of the crime charged in the instant indictment is the presence of a competent tribunal, and the trial court properly so instructed the jury. The House insists that to be such a tribunal a committee must consist of a quorum, and we agree with the trial court's charge that, to convict, the jury had to be satisfied beyond a reasonable doubt that there were 'actually and physically present' a majority of the committee.

"Then to charge, however, that such requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. This not only seems to us contrary to the rules and practice of the Congress but denies petitioner a fundamental right. That right is that he be convicted of crime only on proof of all the elements of the crime charged against him. A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction." *Id.*, 89–90.

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*In *United States* v. *Bryan*, 339 U. S. 323, the Court distinguished the *Christoffel* case and limited it. The *Bryan* case involved a prosecution under the 1857 Act for refusal to produce records before a House Committee. One defense was that the committee lacked a quorum and hence petitioner could not be punished under the Act. The Court stated that the 1857 Act, unlike the perjury statute under which Christoffel was prosecuted, "does not contemplate some affirmative act which is made punishable only if performed before a competent tribunal, but an intentional failure to testify or produce papers, however the contumacy is manifested." *Id.*, 329.

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Alan Barth in his recent book *Government by Investigation* has written a telling account of the abusive practices of certain congressional committees. He has shown the tendency of some committees to trench on the domain of the Executive and of the Judiciary and to invade the shrine of the conscience. There can be no doubt that the loose and oppressive practices of some committees have violated the spirit, if not the letter, of ~~many~~ some constitutional guarantees.

The unfair uses of the investigative function have given rise to many proposals for reform.

These proposals may be grouped into four principal categories. First, the delegation of the investigative function to *ad hoc* commissions. There are precedents for this proposal in the Temporary National Economic Committee which investigated the concentration of economic power in the United States during the late 1930's; in the Hoover Commissions that have been studying the organization of the executive branch of the National Government; in British Royal Commissions; and in the American regulatory commissions which not only decide cases coming before them but also investigate areas of their jurisdiction for the purpose of making new rules or preparing new legislation. The successful experience at home and abroad with these mixed commissions led to the introduction of a bill in 1950 to establish mixed investigating commissions.*

A second proposal would abolish the *special* investigating committees.

A third proposed reform is that congressional committees voluntarily adopt new rules of procedure to govern their hearings and the treatment of witnesses. Several committees have done this in recent years. It is argued, in opposition, that self-discipline cannot be guaranteed

*George B. Galloway discusses the advantages of this proposal in *The Legislative Process in Congress* (1953), pp. 436–437.

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and that all investigating committees should be subject to some uniform and mandatory code of fair play.

Hence the frequent proposal in recent years for the reform of congressional investigations is the adoption, by statute or rule, of minimum standards of committee conduct. In the 83d Congress this proposal was embodied in various bills introduced in the Senate. Similar proposals were introduced in the House of Representatives. Hearings were held on this subject in 1954. But to date no overall reform measure has been agreed upon.

Congress has created its standing and special committees; and Congress alone can abolish them or effectively regulate their conduct. The committees are the creatures, not the masters, of Congress. As Alan Barth says in *Government by Investigation* (1955) 197, "Congress is a coordinate and sovereign branch of the United States government and cannot be ruled, though it may be restrained, from the outside. If its manners are to be mended, they must be mended by itself."

Senator Pepper of Pennsylvania summed up the situation when he said 20 years ago: "Congressional investigations in general and senatorial inquisitions in particular are not going to be controlled by the Supreme Court. Let it once and for all be understood that the power of inquiry exists, that its possession is a great public trust, and that the American people are going to pour out the vials of their wrath upon those who prove themselves unworthy of the trust. We have evolved worthy standards of conduct for professional baseball players. We are hopeful of a similar evolution in the case of prize fighters. It would be lamentable if only Senators were to be classed as invincibly barbarous."

The judicial role is, indeed, a limited one. It supplies a restraint sparingly exercised out of deference for the separation of powers. Yet the role served by the judiciary is important. As stated by Justice Butler in *Sinclair* v. *United States*, 279 U. S. 263:

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"It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs." *Id.*, 292.

At bottom the problem is one of preserving the investigative function and at the same time not trenching on the domains of either the Executive or the Judiciary nor trespassing on the rights of the citizens.

Governing—that is formulating policies, initiating legislation, and administering laws—is the Executive function. Representing the electorate is the legislative function. As Walter Lippmann wrote in *The Public Philosophy* (1955) p. 55, "In the traditions of Western society, civilized government is founded on the assumption that the two powers exercising the two functions will be in balance—that they will check, restrain, compensate, complement, inform and vitalize each one the other."

But as Lippmann observes, "In this century, the balance of the two powers has been seriously upset" by the weakening of the Executive control at the hands of the Legislative. *Id.* One contributing cause, though probably not the most important, has been the gnawing away by congressional committees at the Executive functions, all as Barth's *Government by Investigation*, Taylor's *Grand Inquest* dramatically relate.*

The judicial function has also suffered from the tactics of some committees. The power to inflict punishment is a judicial, not a legislative function. The Fifth Amendment provides, *inter alia*, that "No person shall be held

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*One dramatic episode of this character which reached the Court is revealed in *United States* v. *Lovett*, 328 U. S. 303, discussed at length in Lecture X.

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to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Alan Barth in *Government by Investigation* shows how before some committees some persons have been "held to answer" for infamous crimes, at least in the popular sense of the words.

Walter Lippmann wrote in 1954 that the power of investigation ". . . is in fact a power not only to investigate but to put on trial and to punish. The power of investigation has become a great instrument of political warfare and bears many resemblances to the revolutionary tribunals which appear in time of great crises. . . .

"These tribunals are a morbid development of our institutions, and contrary to their spirit and their genius. For the investigating power of Congress, as now develops, invades the functions of the executive and of the judicial branches of the government."

The tradition of due process allows few exceptions to the rule that a trial must be had before a tribunal appointed by law with all the safeguards imposed by the Bill of Rights. The tradition of civil liberties also prevents a man from being punished for his beliefs, for his conscience, or for his speech. Nor may he be compelled to furnish one piece of evidence that will form a single link in the chain of evidence necessary to convict him. These rights of the individual have the same dignity in our constitutional scheme as the rights of the congressional committee. As Taylor, *Grand Inquest*, p. 279, says:

"Investigations are an invaluable legislative tool for detecting and diagnosing diseases of the body politic, and providing the factual basis for informed legislative policy-making. But investigating committees are totally unsuited to assume the duties of either the policeman or the judge. As detective agencies on the trail of criminal or dangerous individuals, they all too frequently prove themselves amateurish bunglers. As courts to determine the

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culpability of individual behavior, they are usually far too political, passionate and prejudiced to do justice."

I mention the sordid side not to deprecate the investigative function but to give a rounded picture. I, indeed, extol the investigative function. I used it, while I was in the Executive branch, I used it freely and, I hope, fairly. I think it is singularly important as a control over the operations of government and as a means of obtaining information necessary or useful to new legislation and to effective administration.

England's House of Commons asserts the right to ask the ministers questions from the floor. These are written questions, prepared in advance. In Australia, there is a similar practice. But there the questions are oral and come with no advance notice. India too is noted for her practice of examining the ministers. We have no such practice in America. The Cabinet does not submit to questioning on the floors of the two Houses. Rather, the investigative activities of Congress perform that function.

The questioning of the ministers in Australia, England, and India is not always for the ascertainment of facts. It sometimes flavors of partisan politics with the object of embarrassing the government or bringing publicity to the questioner. In America, too, the investigative function is sometimes turned to publicity purposes, with the aim of making political capital out of someone's misfortune or mistake. But the fact that the power is often abused does not detract from its importance.

The right to ask a question and the right to demand an answer are essential to the democratic processes. I have often thought that without those rights any government would be intolerable. Certainly modern government is so complex and involved that opportunities for machinations within the bureaucracy flourish. Only the pitiless light of publicity can restrain them. That is why the

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embarrassing question from the Senator or Congressman sitting at the end of the table serves a high function. His right to demand an answer spells in a crucial way the difference between the totalitarian and the democratic regime.*

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*Karl Marx wrote in Vol. II *Capital* (Everyman's ed. 1930) pp. 863–864: "We Germans would be terrified at the conditions that prevail in our own country if our governments and parliaments were (like England) periodically to appoint commissions of enquiry into economic conditions; if these commissions were endowed with the same ample powers as in England to enable them to search out the truth; if it were possible to find in Germany men as competent and as free from bias and from respect of persons, as are the British factory inspectors, the British medical reporters on public health, the British commissioners of enquiry into the exploitation of women and children, into housing conditions, food supply, etc. Perseus wore a magic cap that made him invisible when he was hunting down monsters. We draw a cap tightly over our own eyes and ears, that we may have warrant for denying the existence of any monsters at all."

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TAGORE LECTURES

V

The Administrative Agency

Professor A. T. Markose of Lucknow University, in a critical account of administrative agencies, made observations which are as telling in America as they apparently are in India. He said, "Today the welfare State primarily endeavours to invest the administrator with almost unlimited discretion to fulfil social needs through the accomplishment of legislative policies by the method of trial and error. But no sooner this movement gained momentum than it was found that there were certain dangers which lie in these developments also. Realisation dawned in many quarters that in the name of efficiency and quickness the rights of individuals could be arbitrarily taken away by conferring powers on the executive without any definite limits or clear rules of procedure. . . . uncontrolled power was apt to be abused. The tendency of the administration to adopt arbitrary ways became rather clear." *Judicial Control of Administrative Action in India*, 15 Sup. Ct. Jour. 1, 4, 5.

Criticisms of the administrative agency have often mounted in a chorus of protests in America, which in turn have been answered by ardent defenders. The criticisms often had merit. Frequently, however, the true objection of the critic was the policy reflected in the law which the agency was enforcing. The late Justice Jackson said in this regard:

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"Those who dislike such activities of the government as regulation of the utility holding companies, of labor relations, or of the marketing of securities, rightly conceive that if they can destroy the administrative tribunal which enforces regulation, they would destroy the whole plan of regulation itself. It may be said that the administrative tribunal is the heart of nearly every reform which attempts to give a new validity to the rights of large numbers of people on the one hand against powerful interests on the other." *The Administrative Process*, 5 Jour. Soc. Phil. 143, 147.

Some of the hostility toward the administrative agency was generated by the judiciary. Some judges saw in this newcomer, this stranger, this alien, a rival or competitor which was treading on a domain that history and custom had made exclusive for the courts. Chief Justice Stone, keenly conscious of this jealousy, warned against it in words now historic in American jurisprudence:

". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." *United States* v. *Morgan*, 307 U. S. 183, 191.

Yet many objections strike deeper to problems that stir a liberty loving people. The agency often has vast power, resting on a discretion that may, in a practical

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sense, be undefined. The standard controlling its action may be as vague and indefinite as "the public interest." The things it controls may be mundane matters of rates chargeable by railroad companies. They may touch human rights, as in immigration and deportation proceedings. They may involve in their licensing requirements the right of men to pursue their callings and to engage in the business of their choice. These rights to engage in business may involve considerations of great *public* importance. For example, the agency that allocates radio stations and television stations among competing claimants makes decisions with powerful political impact. Its method of allocation may tip the balance in favor of one party and against another. The agency that fixes rates may wield great leverage on the economy. It may favor one community over another or one region over another, changing the course of industrial development in the nation. See *New York* v. *United States*, 331 U. S. 284.

The power of the administrative agency, in other words, affects the rights of individuals, the interests of communities and regions, the welfare of the nation. Insofar as its power is subject to no curb or restraint, the agency becomes a law unto itself.

Yet the administrative agency is an indispensable adjunct of modern government. The complexities of modern government have made law-making difficult for legislators.

The legislature can state the evil or the disease which it desires to control. Yet it will not be able to identify the persons who are contaminated. Hence it must leave the process of identification to an agency.

The legislature can specify the abuses which it wants to eradicate and name them in specific and vivid terms. Yet being unsure that it has included all of the species, it adds a catch-all to cover like evils.

A legislature unable to draw a precise statutory line supplies a statutory guide, ~~leaving to~~ letting an agency ~~to~~ establish the line, case by case.

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The legislature may desire to blanket a field with regulations specifying what is reasonable conduct and yet not be certain what is reasonable under all circumstances. Hence an agency is entrusted to classify the subject matter and, in the manner of setting speed limits for special areas, determine what is reasonable for each group.

The need to delegate authority is clear. Yet the power can be so easily abused that controls are necessary. The modern law of administrative procedure is a reconciliation of the two requirements.

A. *Delegation of Powers.*

There is no doubt that the agency which determines that a particular individual or company should be brought within the regulatory reach of the law is a law-making authority. It is, in other words, clear that the administrator who by order, by rule, or by regulation extends the civil or criminal sanctions of the law to named parties indulges in legislating. If that step constitutes law-making in the constitutional sense, then it transgresses Article I, Section 1 of the Constitution which provides, "All legislative Powers herein granted shall be vested" in Congress.

It is, however, settled constitutional doctrine that the acts of the agency in defining and applying the law are not always an assertion of "legislative powers" in the constitutional sense. The point is well-illustrated by *Bowles* v. *Willingham*, 321 U. S. 503. In that case, the Court upheld the validity of emergency rent control legislation, enacted during the Second World War, against a charge of improper delegation of powers. The Court stated that Congress had made clear its policy of waging war on inflation, and had defined the circumstances in which its announced policy was to be declared operative and the method by which it was to be effectuated. "Those steps constitute the performance of the legislative function in the constitutional sense." *Id.*, 514. In explaining the need for reliance on administrative agencies, the Court stated:

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"In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward." *Id.*, 515.

Congress therefore may be said to exercise the *primary* legislative function, the administrative agency a *secondary* one.

The adequacy of the legislative standard has been the subject of much litigation. The *Bowles* case represents the current approach. An earlier decision, whose tradition it exemplifies, is *Hampton & Co.* v. *United States*, 276 U. S. 394. That case involved the validity of legislation authorizing the President to adjust certain tariff duties imposed by Congress so as to compensate for differences in the costs of production in the United States and other countries, the object being to "enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States." *Id.*, 404. Because of the difficulty in determining such differences on the basis of available information and the need to make adjustments for changing conditions, Congress used the method of describing its policy and plan and entrusting the President with the task of making the necessary findings and adjusting the rates accordingly. In upholding the statute against a charge of unlawful delegation of power, the Court stated:

"If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix . . . rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions or production at home and abroad, it may authorize the Chief Executive to carry out this

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purpose . . . ." *Id.*, 409. And see *Yakus* v. *United States*, 321 U. S. 414; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 398–400. Or as stated in *American Power Co.* v. *SEC*, 329 U. S. 90, 105:

"The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations."

The most notable American case holding the administrative standards constitutionally *inadequate* is *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. That case involved certain slaughterhouse operators who were charged with violations of a Poultry Code, which had been promulgated under the National Industrial Recovery Act. The Act authorized the President to approve codes of fair competition for a trade or industry. The provisions of the Poultry Code dealt with hours, wages, trade practices, and other problems of the industry. The Act was held invalid as involving an improper delegation of legislative power. Chief Justice Hughes, writing for the Court, explained the vice of § 3 of the Act.*

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*Section 3 (a) of the Act provided:

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies

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"It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power." *Id.*, 541–542.

It was, to use the words of Justice Cardozo, "delegation running riot." *Id.*, 553.

The Supreme Court of India laid down the basic principles governing the problem of delegation of legislative power in the famous *Reference under Article 143*, 14 Sup. Ct. Jour. 527. That case teaches that the scope of permissive legislative action, while not unlimited, is extremely broad. Justice Fazl Ali summed up his conclusions as follows:

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or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

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(1) The Legislature must normally discharge its primary legislative function itself and not through others.

(2) The Legislature may legislate in a sphere in which it has sovereign power in any way it regards as best suited to carry out its policies in making the particular law, and it may use any outside agency to the extent it finds necessary to do things that are inconvenient or impossible for the Legislature itself to deal with.

(3) The Legislature cannot abdicate its legislative functions and must therefore see that the outside agency acts in a subordinate capacity. (And see *Bagla* v. *Madhya Pradesh*, 17 Sup. Ct. Jour. 637.)

(4) There are only two main checks in India on the power of the Legislature to delegate, namely its good sense and the principle that it should not go to the extreme of abdication and self-effacement. *Id.*, 571.

Professor Alexandrowicz-Alexander wrote concerning that opinion of Justice Fazl Ali: "This means that no parallel legislature can be set up by Parliament and that *primary* legislation must always be retained by it." *Delegation of Legislative Power in India*, 3 Amer. Jour. Comp. L. 72, 77.

Narain v. *Uttar Pradesh*, 17 Sup. Ct. Jour. 238, involved a system of licensing coal dealers and fixing their prices, a system of control instituted by a state government. One provision of the law was to the effect that the licensing agent might grant or refuse a license "for reasons to be recorded" by him. The Supreme Court construed this to be a grant of "absolute power" to the State Coal Controller which he in turn could delegate to any person. It was held that this grant of power was not a "reasonable" restriction on the right to carry on a trade or business, within the meaning of Article 19 (6) of the Constitution. The Court, speaking through Justice (now Chief Justice) Mukherjea, said:

"No rules have been framed and no directions given on these matters to regulate or guide the discretion of the Licensing Officer. Practically the Order commits to the unrestrained will of a single individual the power to grant,

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withhold or cancel licences in any way he chooses and there is nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same." *Id.*, 243–244.

As to the recording of the reasons of the licensing authority, Chief Justice Mukherjea said:

"This safeguard, in our opinion, is hardly effective; for there is no higher authority prescribed in the Order who could examine the propriety of these reasons and revise or review the decision of the subordinate officer. The reasons, therefore, which are required to be recorded are only for the personal or subjective satisfaction of the licensing authority and not for furnishing any remedy to the aggrieved person." *Id.*, 244.

On the other hand, the Court in *Edward Mills Co.* v. *Ajmer*, 18 Sup. Ct. Jour. 42, upheld minimum wage legislation against a charge of delegation of powers. The Act authorized the setting of minimum wages for certain specified industries and also permitted the Government to add other industries by notification. It was argued that there was no legislative policy to guide the Government officials charged with adding to the list of industries covered. The Court held that the legislative policy, which was to guide in the selection of industries, was clearly indicated in the Act, namely, to avoid exploitation of labor by setting minimum wages in industries where due to unequal bargaining power or other causes wages were depressed. It was necessary to allow flexibility for adaptation to local conditions, said the Court, speaking through Chief Justice Mukherjea.

There are differences in emphasis between America and India on this problem of delegation of legislative power. But by and large the two judiciaries approach the problem of delegation in much the same manner.*

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*Justice P. N. Sapru stated in his Agra University Lectures in 1953:

"The question of delegated legislation has been the subject-matter of much controversy in our law courts. It is permissible, I hope, to

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B. *Judicial Review.*

The demand for judicial control of the administrative process has mounted both in America and in India.* The demand in America reached its peak in 1946 with the enactment of the Federal Administrative Procedure Act,

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maintain the view that under a system of responsible government where there is no separation of powers, the real safeguard the citizen has against delegated legislation is not solely legal but essentially political. For it is to a vigilant public opinion and representative legislatures that in the ultimate analysis the real safeguard against the menace to the personal liberty involved in what is called delegated legislation lies."

*An Indian complaint has been stated by Prof. A. T. Markose, *Judicial Control of Administrative Action In India*, 15 Sup. Ct. Jour. 1, 9–10:

"To-day in India the need for judicial control is perhaps at the maximum. The infant Republic is born amidst manifold maladies. It has a legacy of centuries of foreign hegemony. The political party that has captured power both in the Centre and in the States was geared to fight foreign domination. It has thus a steam roller organisation and the freedom of opinion of the individual party member cannot be effectively exercised in the Legislature. At the same time there is no organised and effective opposition against the majority party. Even though a Federal Republican form of government with a written—elaborately written—Constitution has been adopted, the English Parliamentary Executive was preferred to the United States Presidential Non-parliamentary Executive. This brings the Legislature under the control of the Executive and with the clear majority that the party has, the desire for any compromise of its views by the influence of the view of the 'other side,' which is the secret for the success of democracy, becomes less pronounced. All these factors tend to increase the power of the Executive. Meanwhile a phenomenal population seething in poverty has a temper which respects neither law nor authority. According to some observers the pace of legislation is too fast for the nation to assimilate it properly. The aims underlying certain legislation have not secured general approval. It has been remarked that a 'nation cannot be reformed by laws.' If under these conditions, administrative tribunals are handed over final powers to deal out 'justice,' the faith that the people have in the conception of justice is likely to be lost. The only agency to keep up the balance is the judiciary."

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5 U. S. C. § 1001 *et seq.*, which I have included as an Appendix to this Lecture.*

First of all, the Act in general applies to all agencies of the federal government, with certain specified exceptions. In addition, certain functions are expressly excluded from particular portions of the Act. For example, § 3 of the Act, which provides for publication of agency rules and orders, expressly excludes "(1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency."

Sections 4 through 9 set forth, in some detail, the procedures to be followed in connection with the rule-making and adjudicative functions of administrative agencies—*e. g.*, hearings, notice, subpoenas, and the decisional process.

Section 10, which is the heart of the Act and of primary importance for the purposes of this Lecture, provides for judicial review of agency action.

The provisions of Section 11 are designed to insure an independent group of trial examiners who will conduct agency hearings in a fair and impartial manner.**

The purpose of the Act is revealed by the Report of the Committee on the Judiciary:

"The bill is an outline of minimum essential rights and procedures. Agencies may fill in details, so long as they publish them. It affords private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple framework upon which to base such operations as are subject to the

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*For an exhaustive review of decisions under the Act, see Schwartz, The Administrative Procedure Act in Operation, 29 N. Y. Univ. L. Rev. 1173.

**_United States_ v. _Tucker Truck Lines_, 344 U. S. 33, held that an objection to agency proceedings based on failure to comply with the provisions of § 11 of the Administrative Procedure Act, regarding appointment of trial examiners, was waived by failure to raise it during the administrative proceedings.

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provisions of the bill." H. Rep. No. 1980, 79th Cong., 2d Sess.

As stated in the report of the Committee on the Judiciary, "By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure." S. Rep. No. 752, 79th Cong., 1st Sess.

All constitutional requirements to one side, Congress can grant or withhold judicial review of administrative action as it may choose. Congress may in terms exclude all review; or it may so design an administrative procedure as to leave the inference clear that it wanted the judiciary to keep its hands off. An example of the latter is found in *Switchmen's Union* v. *Board*, 320 U. S. 297, involving the sensitive problem of labor relations in the railway field. Congress created the National Mediation Board and gave it powers to direct elections so that representatives of laboring men could be chosen. It certified one union as the winner of an election. The competing union sued in the federal courts to have the certificate reviewed. There was no express provision for judicial review; and the Court held that in light of the provisions of the Act and its history, none should be implied.

It is safe to say that, with few exceptions the jurisdiction of an agency to act can be tested in court proceedings. *Ludecke* v. *Watkins*, 335 U. S. 160, is ~~one~~ another exception. It involved the deportation under an Act of Congress of an alien enemy. The President was authorized in the event of war to remove them; and in 1945 the then President directed the removal of all alien enemies "who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States." The power of the Attorney General to act without giving the alien notice and a fair hearing to determine whether he was "dangerous" was challenged by an alien in a *habeas corpus* proceeding. The Presidential

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decision to remove an alien enemy was held to be conclusive, a divided Court holding that there was no judicial review. Speaking of the power of the President, the Court said, "The Founders in their wisdom made him not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs." *Id.*, 173.

A like ruling was made in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103. The Civil Aeronautics Board grants certificates for overseas or foreign air transportation; and those orders are made final by approval of the President. A divided Court held that an order approved by the President was not subject to judicial review. The Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.*, 111.

The *Ludecke* and *Waterman* cases are, indeed, branches of the doctrine of the political question discussed in Lecture II. They are extreme applications of the principle that the judiciary should keep its hands off the domain of the Executive.

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There are other cases, discussed in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, which deny judicial review because of the inability to satisfy the "case" or "controversy" requirement of Article III of the Constitution.

There will be other barriers to judicial review of administrative orders,* *e. g.*, the failure to satisfy the con-

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*The interim quality of the administrative order and the failure to exhaust administrative remedies often make the effort to obtain judicial review premature. *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 383–387. Where Congress has provided an administrative procedure with judicial review at the end of it, no short cut may be taken on the ground that the complaint is groundless and the hearing will result in irreparable damage. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. A rehearing of the administrative order need not be sought before judicial review is obtained, at least where the rehearing rests solely in the discretion of the agency. *Levers* v. *Anderson*, 326 U. S. 219.

That doctrine is closely related to the "Abilene Doctrine," so named because it originated in the celebrated case of *Texas R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. A shipper attempted to recover in a state court action from a carrier for allegedly excessive rates, though the rates had been charged in interstate shipments and were under the jurisdiction of a federal administrative agency, the Interstate Commerce Commission. The Court held that no such action could be maintained, explaining:

". . . a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable. . . ." *Id.*, 448. The doctrine has since become firmly established and has been applied in a multitude of cases. See: *Texas R. Co.* v. *Sabine Co.*, 227 U. S. 111 (rate-setting in foreign commerce); *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195 (complex dispute regarding proper point of delivery by carrier); *Far East Conference* v. *United States*, 342 U. S. 570 (legality of dual system of rates).

The doctrine has been restricted, however, so as not to prevent judicial action in certain areas where, it is felt, the courts are as competent as the agency to make the initial decision and the problem lies beyond the agency's current activity. Thus, in *Missouri Pacific R. Co.* v. *Larabee Mills*, 211 U. S. 612, the Court held that a state court could determine whether a railroad was obligated to

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ventional requirements of equity, the prematurity of the action,* etc.

Those are in the main the exceptions. For the very existence of courts, the grant of broad jurisdiction to them (see *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Stark* v. *Wickard*, 321 U. S. 288, 307–308), and

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perform local switching service, since Congress and the agency concerned had not acted on the problem, and it was a matter easily susceptible of local regulation. And in *Louisville & Nashville R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, the *Abilene* doctrine was held inapplicable where the dispute concerned the validity of state legislation restricting use of alcoholic beverages, under which the railroad refused to deliver such goods to certain points in the State. "That is a question of general law for a judicial tribunal," said the Court, not one for the application of administrative expertise. Still another exception was carved out in *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, where the Court held that a suit for damages based on discriminatory enforcement of the carrier's own rule regarding the furnishing of cars, did not involve administrative questions within the primary jurisdiction of the Commission, but a simple determination which the courts were qualified to make.

In *Great Northern R. Co.* v. *Merchants Elevator Company*, 259 U. S. 285, the Court held that in an action to recover charges by a carrier in which the issues depended solely on the legal construction of the tariff, and not on fact questions calling for administrative expertise, the courts could act without initial resort to the Interstate Commerce Commission. Justice Brandeis, speaking for the Court, explained:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. . . . It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute." *Id.*, 291.

*A regulation of an agency may be an "order" subject to judicial review. See *Columbia System* v. *United States*, 316 U. S. 407.

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LECTURE V

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And that review extends to actions of agencies ~~taken~~ under ecutive Orders as well as to decisions made under Acts of Congress. Ex parte Endo, 323 U.S. 283; Peters v. Hobby, 349 U.S. _____.

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the availability of a wide variety of writs to express their will have afforded judicial review in most cases. Rider 16

Estep v. *United States*, 327 U. S. 114, shows one type of review. The case involved a prosecution for refusal of a member of a religious sect to be inducted into the Army. He claimed exemption as a minister; but the board making the classification denied it. No appeal was provided from the board to a court, in order to determine whether the board was acting within the law. The orders of the board were made "final." The Court, however, held that the jurisdiction of the board could be tested in the criminal prosecution. "We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.*, 121. The review granted the order of the board in the criminal proceeding is an extremely narrow one:

"The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant." *Id.*, 122–123.

The *Estep* case illustrates how, even in the absence of a provision for judicial review of agency action, American courts are alert to police the administrative branch to see that it does not exceed its rightful bounds. *Estep* is exceptional only in the sense that it allowed judicial review during the course of a criminal trial and in defense of the charge leveled against the accused. The method of judicial review is any available writ that is adequate

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to challenge the legality or constitutionality of agency action. As stated in §10 (b) of the Administrative Procedure Act, the form of judicial review can be "any special statutory review proceeding" or "any applicable form of legal action . . . in any court of competent jurisdiction."

The available writs are as broad as the arsenal provided by the Constitution or by the legislature. *Habeas corpus* is repeatedly used to challenge the jurisdiction of a tribunal that has intruded on the liberty of the citizen. It was used in *Ex parte Milligan*, 4 Wall. 2, *In re Grimley*, 137 U. S. 147, and *Johnson* v. *Sayre*, 158 U. S. 109, to challenge the jurisdiction of military commissions. It is continuously used to challenge the authority of immigration officials who seek to exclude a person or to deport him. *Ng Fung Ho* v. *White*, 259 U. S. 276; *Bridges* v. *Wixon*, 326 U. S. 135; *Shaughnessy* v. *Mezei*, 345 U. S. 206.

A declaratory judgment or an injunction may also serve as the occasion for judicial review of agency action. A declaratory judgment was used in *McGrath* v. *Kristensen*, 340 U. S. 162, to test the validity of the proposed deportation of an alien. Cf. *Heikkila* v. *Barber*, 345 U. S. 229. An injunction was the relief used in *Stark* v. *Wickard*, 321 U. S. 288, to obtain judicial review of the administrator's action under a law regulating the marketing of milk. An injunction was used in *Williams* v. *Fanning*, 332 U. S. 490, to obtain an adjudication as to the validity of a fraud order issued by the Post Office Department, and in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, to test the legality of action of the Interior Department in excluding commercial fishermen from certain areas.

Mandamus was the writ sought in *United States* v. *Dern*, 289 U. S. 352, for determining the duty of the Secretary of War to authorize construction of a wharf, and in *Federal Commission* v. *Broadcasting Co.*, 309 U. S. 134, for testing the authority of an agency on remand of a cause after reversal of an agency order by a court.

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And there may be instances, as *Degge* v. *Hitchcock*, 229 U. S. 162, indicates, where the writ of certiorari will issue to review a ruling of an executive officer.

Each of these remedies has conditions precedent to its use—conditions that may strictly curtail its usefulness—such, for example, as the showing of a duty to act in order for mandamus to issue (*United States* v. *Dern*, 289 U. S. 352) or that remedies at law are inadequate in order to obtain relief by injunction. *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86.

And the review obtained by these remedies is not a review on the whole record but one restricted to questions of law—whether the agency has exceeded its jurisdiction, whether it has violated the rules governing its procedure, whether it has committed errors of law in construing its grant of authority, whether it has violated constitutional guarantees. Moreover, the relationship of the reviewing court and the agency is quite different from that of an appellate court and an inferior court, as *Federal Commission* v. *Broadcasting Co.*, 309 U. S. 134, shows. In that case the appellate court set aside an order of the agency denying a radio license. On remand the agency set that application for hearing with two rival applications. The appellate court granted a writ of mandamus, directing the agency to hear and consider the applications they had reviewed "on the basis of the record as originally made and in accordance with" the opinion of the reviewing court. That action was held to be error. The Court said:

"The Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.' The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it." *Id.*, 145.

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When Congress has made specific provision for judicial review, the review is as broad or as limited as Congress chooses to make it, save for constitutional questions. The starting point has always been that "A finding without evidence is arbitrary and baseless." *Interstate Commerce Commission* v. *Louisville R. Co.*, 227 U. S. 88, 91. The statutory requirement that the findings of an agency be conclusive "if supported by evidence" is customarily construed to mean that the order stands if there is "substantial" evidence to support the findings. See *Washington Coach Co.* v. *Labor Board*, 301 U. S. 142, 146–147. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Edison Co.* v. *Labor Board*, 305 U. S. 197, 229; *Labor Board* v. *Columbian Co.*, 306 U. S. 292.

An interesting chapter in administrative law could be written on how the Court slowly relaxed that requirement in the labor-management field—not purposely and almost imperceptibly—so that some evidence to support the findings was sometimes substituted for substantial evidence. See *Labor Board* v. *Waterman S. S. Corp.*, 309 U. S. 206; *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105, 107. Some lower courts felt compelled to sustain the administrative findings "even when they are contrary to the great weight of the evidence." *Wilson & Co.* v. *Labor Board*, 126 F. 2d 114, 117. One court stated that the substantial evidence test required the acceptance of the administrative finding on the most tenuous facts: "Though it may strain our credulity, if it does not quite break it down, we must accept it. . . ." *Labor Board* v. *Columbia Products Corp.*, 141 F. 2d 687, 688.

There was much criticism of that contracted and narrow type of judicial review. Various reforms were suggested, all as reviewed in *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474. Finally, Congress amended the law governing review of administrative orders in the labor-man-

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agement field and made the findings of the agency with respect to questions of fact conclusive "if supported by substantial evidence on the record considered as a whole." 29 U. S. C. § 160 (e). The result has been a marked change in the judge's approach to a record from the administrative agency. "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id.*, 490. And see *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498.

I have said that Congress could make judicial review narrow or broad, save for constitutional limitations. Those limitations implied by the Constitution have not yet been pricked out. Few cases have presented the question.* I indicated in an earlier Lecture that the guarantee of *habeas corpus* was rooted deep in the Constitution and could be suspended only in extreme situations. *Habeas corpus*, in other words, stands as a ready instrument for judicial review.

There is a constitutional right to a judicial hearing on some issues, whether by *habeas corpus* or by some other method of review. If there were not, then the liberties

; Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S.

Crowell v. *Benson*, 285 U. S. 22, arose under the employee compensation provisions of the Longshoremen's Act. Questions were raised concerning the determination of fundamental or jurisdictional facts, upon which the power of Congress to enact the Act depended, namely, that the injury occurred on navigable waters of the United States, and that the relation of master and servant existed. A divided Court held the reviewing court could make its own determination of those jurisdictional facts in a trial *de novo*. Justice Brandeis, joined by Justices Stone and Roberts, wrote a vigorous dissent.

The decision stands in isolation. Subsequent decisions under the Act have not applied the doctrine to other factual issues. See *South Chicago Co.* v. *Bassett*, 309 U. S. 251 (whether employee a member of the crew); *Parker* v. *Motor Boat Sales*, 314 U. S. 244 (whether employee was acting in the scope of his employment).

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of a citizen could be made dependent on the whim or caprice of the executive branch. It is clear that a person who claims to be a citizen cannot be deported without a judicial hearing, for that is the requirement of procedural due process. *Ng Fung Ho* v. *White*, 259 U. S. 276. A civilian cannot be tried by a military commission for acts committed as a civilian. See *Duncan* v. *Kahanamoku*, 327 U. S. 304. In addition, the Constitution places some limits on the finality of administrative action. The necessity of defining those limits has rarely arisen because of the meticulous care with which the legislative branch has granted judicial review of administrative orders.

The Indian Constitution includes administrative agencies in its provisions for judicial review. Article 136 (1) provides: "Notwithstanding anything in this chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India." * And Article 226 (1) grants every High Court power "to issue to any person or authority . . . directions, orders, or writs" for the enforcement of the Fundamental Right conferred by Part III of the Constitution or for any other purpose.

The Supreme Court of India has ruled that the power granted by Articles 136 and 226 extends to administrative agencies and may not be taken away or whittled down by the legislature. *Krushna* v. *Binod*, 41 A. I. R. 202; *Shankar* v. *Singh*, 41 A. I. R. 520.

But the "tribunal" whose orders can be reviewed by appeal to the Supreme Court "must perform some kind of judicial function and partake to some extent of the character of a court." *Bharat Bank* v. *Employees*, 37 A. I. R. 188, 190. The cases are few in number; but

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*Article 136 (2) excepts courts or tribunals "constituted by or under any law relating to the Armed Forces."

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apparently the agencies included in "tribunal" within the meaning of the Indian Constitution would encompass the run of administrative agencies in America. The Supreme Court held in the *Bharat Bank* case that ~~the~~ industrial tribunal was included in that category:

"It appears that the proceedings before it commences on an application which in many respects is in the nature of a plaint. It has the same powers as are vested in a civil Court under the Code of Civil Procedure when trying a suit, ... It may admit and call for evidence at any stage of the proceeding and has the power to administer oaths. The parties appearing before it have the right of examination, cross-examination and re-examination and of addressing it after all evidence has been called. A party may also be represented by a legal practitioner with its permission. . . . The main function of this tribunal is to adjudicate on industrial disputes which implies that there must be two or more parties before it with conflicting cases, and that it has also to arrive at a conclusion as to how the dispute is to be ended. . . ." *Id.*, 190–191.

The scope of judicial review in India is apparently still in evolution.* One critic asserts that Indian courts will set aside an administrative decision "only when it is based on no evidence." Markose, *The Judiciary and the Executive in India*, 16 Sup. Ct. Jour. 111, 117. But I sense an alertness on the part of the Indian judiciary to hold agencies to procedural requirements of law (*Bharat Bank* v. *Employees*, 37 A. I. R. 188), to reverse them where they have not based their decision on the record (*Vishwanath* v. *Custodian*, 40 A. I. R. 64) and to set aside their orders where "there was no evidence of an admissible nature" on which the administrative finding could rest. *Lal* v. *District Magistrate*, 39 A. I. R. 822, 823.

In *British Medical Stores* v. *Mal*, 42 A. I. R. 5, decided by the High Court of Punjab, an order fixing rents

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*It is apparent that in India as in America the very nature of a writ may drastically control the scope of review. See *Bombay* v. *Advani*, 13 Sup. Ct. Jour. 451.

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was entered without a hearing and on the basis of the personal observation of the Rent Controller. The rent order was, therefore, nullified, the court holding that the statute gave the administrator "an unfettered and unguided discretion" in fixing the rent, provided for no hearing, and allowed orders to be entered on "private enquiries." The Court said:

"The role of the Courts in regard to statutory Tribunals is to serve as a check on the Tribunal, a check against excess of power and abusive exercise of power in derogation of private right. Broadly speaking judicial control is assured where amongst other things review can be had only on the following grounds:

"1. ULTRA VIRES: to ensure that the determination by the tribunal was within the authority delegated on the agency.

"2. NATURAL JUSTICE: that at least minimum standards of fairness which in the United States is called 'the fundamentals of fair play' are observed; . . .

"3. SUBSTANTIAL EVIDENCE: that the administrative determination has basis in evidence of rational probative force." *Id.*, 11–12.

The court said the instant order was invalid, *first* because it violated the principles of natural justice; and *second*, because there was no basis in evidence adduced at a hearing and present in a record which supported the order. And see *Dhakeswari Cotton Mills Ltd.* v. *Commissioner*, 42 A. I. R. 65, discussed in Lecture XII.

C. *Fairness of Agency Procedures.*

The administrator working in one field tends to become an expert. One virtue of the administrative procedure is that it brings *expertise* to the decision of a problem. The mind of the expert, unlike the legislative mind, is trained in the particular field. He is the engineer, the doctor, the lawyer, the sociologist, the financier who can manage the complexities of a segment of a problem with

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confidence and authority. His existence is the only way the administrative process can be made sufferable. For his informed discretion eliminates inequalities and preferences, ameliorates harshness, and enlightens the enforcement program.

Yet to make the expert all-powerful would then create an intolerable situation. For power is a heady thing; and even the best of men get delusions of omnipotence.

And so it is that modern administrative law has placed a restraint on the expert. He must make a record; and the record must be made in proceedings that are fair. He must give reasons for his decisions.

Experience showed that once these barriers were let down, the administrative agency was propelled largely by emotion or prejudice. Political considerations controlled its actions; its decisions were indeed political patronage in disguised form. Personal liberties suffered; so did large property interests.

Though restraints have been placed on the experts, the room for *expertise* still remains. The clash between the expert and the restraints placed upon him has been a subtle one in the development of the law.

Those who fix the rates cannot, in making their valuation of property, consider material evidence outside the record. *Ohio Bell Tel. Co.* v. *Commission*, 301 U. S. 292. Yet their judgment on probable effects on traffic from rate changes is entitled to great respect, where "the data basic to a judgment" have been put in the record. *Market Street R. Co.* v. *Commission*, 324 U. S. 548, 560. The whole rate-making process "is the product of expert judgment which carries a presumption of validity." *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 602. The respect given the expert judgment of the administrative agency in complicated financial matters has been well-nigh conclusive, where existing facts are uncontested and the question is one of judgment as to the best way to execute the legislative policy. See *Securities Commission* v. *Chenery Corp.*, 332 U. S. 194; *Railroad Commis-*

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sion v. *Oil Co.*, 311 U. S. 570; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523; *Ecker* v. *Western Pac. R. Corp.*, 318 U. S. 448.

Some words of a statute may be words of art, having a definite meaning. Others may take their meaning from their setting in a statute and be defined only in light of the purpose of the legislature and the objective sought to be reached.

While the courts have the final say in construing the words of a statute, the choice of the myriad situations to which it should apply often turns on specialized knowledge of the agency. The Court has therefore given the agency's determination special weight. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304 (unfair method of competition); *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177 (interurban electric line); *Gray* v. *Powell*, 314 U. S. 402 (producer of coal); *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (working time); *Labor Board* v. *Hearst Publications*, 322 U. S. 111 (employee). As the Court said in the latter case:

". . . where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a 'member of a crew' (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251) or that he was injured 'in the course of employment' (*Parker* v. *Motor Boat Sales*, 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the 'control' of another (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125), the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Id.*, 131. Cf. *Labor Board* v. *Highland Park*, 341 U. S. 322.

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But with due allowance to the *expertise* and wide discretion of the agency, the Court has the ultimate say whether the application of the Act is proper. A classic example is *Addison* v. *Holly Hill Co.*, 322 U. S. 607. Certain agricultural workers were exempt from the minimum wage requirements of the Labor Standards Act if they were "within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural . . . commodities for market . . . ." The Administrator ruled that an employee might be within the "area of production," "if he performs those (canning) operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven." The Court held that the Act did not authorize the Administrator by defining "area of production" to except establishments from the exemption according to the number of workers employed by them. ". . . Congress did not leave it to the Administrator to decide whether within geographic bounds defined by him the Act further permits discrimination between establishment and establishment based on the number of employees." *Id.*, 616. And see *Bridges* v. *Wixon*, 326 U. S. 135, 141.

At times, it is not clear whether the agency has applied the correct statutory test. Once that is in doubt, the whole case is undermined, for there is no guide by which the basic findings may be weighed. Such orders are reversed. As the Court said in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489:

"Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erro-

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neous statutory construction lies hidden in vague findings, then statutory rights will be whittled away." And see *Florida* v. *United States*, 282 U. S. 194, 215.

The administrative agency often needs to gather data to carry on its rule-making and adjudicative functions. To do that it frequently needs the power to compel production of papers, documents, business records, and other material. The Court has recognized the need, and has upheld the power of Congress to delegate the subpoena power.* *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, involved a subpoena issued by the Secretary of Labor in proceedings under an Act which provided for minimum wages and maximum hours for persons employed by government contractors. The Act authorized the Secretary of Labor to issue orders requiring attendance of witnesses and production of evidence. Disobedience of such an order was grounds for instituting proceedings in the District Court requiring production of the evidence; failure to obey the court order was to be punishable as contempt. The Secretary, suspecting violations by a contractor, subpoenaed certain payroll records. The issue of violation turned on the question of the application of the Act to certain plants of the contractor. The District Court held that it should decide whether the Act and contracts involved covered those plants, before permitting the Secretary to subpoena the plant records. If it found the Act inapplicable, it ruled there would be no basis for subpoenaing the records.

This was held to be error, since the basic task of making initial determinations as to violations of the Act had been assigned to the agency, not to the courts. In carrying out that task, said the Court, the agency need not make a decision on coverage in advance of subpoenaing evidence of underpayment. "The evidence sought by the sub-

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*Provisions relating to compulsory production of documents are now included in the Administrative Procedure Act, § 6 (c), set forth in the Appendix to this Lecture.

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poena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration." *Id.*, 509.

And see *Oklahoma Press Co.* v. *Walling*, 327 U. S. 186; *United States* v. *Morton Salt Co.*, 338 U. S. 632.

Some of the most difficult problems in the field of administrative procedure have centered around the right to a hearing and the extent of ~~any~~ the hearing to which the aggrieved parties are entitled. These problems are complicated by the fact that administrative agencies, as noted earlier, perform a great variety of functions. Thus, a procedure which would be quite satisfactory in connection with the promulgation of general prospective regulations may be grossly unfair if adopted in connection with proceedings aimed at revocation of an individual's license to carry on some business.

This distinction is recognized in § 2 (c) of the Administrative Procedure Act, which makes special provision for "rule making," or the process for formulating, amending, or repealing statements "of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency. . . ."

Section 4 of the Act sets out the procedure to be followed in rule making. General notice is to be published in the Federal Register, a publication established by Congress in 1935 for the promulgation of agency regulations. The agency then affords interested persons an opportunity to participate through submission of written data, views, or arguments, with or without opportunity to present oral argument. After consideration of all relevant matter presented, the agency incorporates in the rules adopted a statement of their basis and purpose.* This procedure is not applicable to rule making which is required by statute

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*See *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676.

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to be made after opportunity for an agency hearing, in which case a more elaborate procedure is detailed, analogous to that provided in the performing of "adjudicative" functions.

Sections 5, 7, and 8 detail the procedure to be followed in cases of adjudication required by statute to be determined on the record after opportunity for an agency hearing. Certain information is to be furnished to persons entitled to notice of the hearing, including the nature of the hearing and the matters of fact and law asserted. § 5 (a). The presiding officers are given various powers for the conduct of hearings (§ 7 (b)), such as authority to rule upon offers of evidence, to issue subpoenas as authorized by law, and to hold conferences to settle issues by consent. "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." § 7 (c). Sections 5 (c) and 8 contain provisions designed to insure fairness in the decisional process.

Where the Administrative Procedure Act and other statutory provisions contain detailed provisions as to the need for a hearing and the type of hearing required, the function of the courts is, of course, to determine whether those requirements ~~are constitutionally valid~~ and, if so, whether they have been complied with in a given case. A more difficult problem arises where, as is frequently the case, the statutes are silent either as to the right to a hearing or as to the type of hearing required when one is indicated. In such cases, the Court must determine the rights of the parties affected from the standpoint of the probabilities of the legislative purpose and the minimum requirements of ~~constitutional~~ due process.

meet the constitutional minimum

Bi-Metallic Investment Co. v. *Colorado*, 239 U. S. 441, involved a suit to enjoin a state agency from enforcing an order increasing the taxable value of all property in the city of Denver, Colorado, by some 40 per cent. A

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real estate owner challenged the order on the ground that it had been given no opportunity to be heard and was therefore being deprived of property without the Due Process required by the Fourteenth Amendment. In rejecting this contention, the Court explained:

"Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Id.*, 445.

The Court rejected the view that notice and hearing—which are often identified as the essence of procedural due process—were indispensable to every agency proceeding, even though of general and prospective application, as a constitutional minimum.

Moreover, even where an opportunity to be heard is essential to due process, it is not always necessary that such opportunity precede administrative action, at least where an emergency situation requires prompt action by the agency and an opportunity to be heard on the propriety of the action is afforded at some subsequent stage. *North American Co.* v. *Chicago*, 211 U. S. 306, is illustrative. There, the Court upheld, as against a claim of denial of due process, a statute which provided for the seizure, condemnation, and destruction of unwholesome food without prior hearing. In answering a claim that there was no sufficient emergency to justify such summary action, the Court stated that the legislature might reasonably conclude that such action was necessary, since the continued existence of the food created a serious danger to public health. The Court pointed out that the

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owner of the food was not completely without a remedy, since the party seizing the food must defend the propriety of his action in subsequent proceedings against him.

Even where notice and hearing are not required as a matter of constitutional right, the Court may find that such was the intent of Congress in enacting the legislation under which the agency acts. *Knauff* v. *Shaughnessy*, 338 U. S. 537, and *United States* v. *Nugent*, 346 U. S. 1, illustrate the extreme to which the Court has sometimes gone in the opposite direction. In the *Knauff* case, the alien wife of an American citizen sought admission to the United States under legislation permitting entry of war brides. The Attorney General, deeming her admission prejudicial to the interests of the United States, ordered her excluded, without furnishing any opportunity for a hearing. Although there were convincing arguments against such an interpretation of the applicable statutory provisions, a divided Court nevertheless upheld the action, relying on the broad powers of Congress to authorize exclusion of aliens.

Under the Selective Service Act, exemptions have been provided for persons conscientiously opposed to participation in war for religious reasons. The Act provides that if the claim of the conscientious objector is denied by the local board, he is entitled to a hearing by the Department of Justice, which recommends action to the appeal board passing on his case. The Department adopted the practice of relying on investigations and reports by the Federal Bureau of Investigation. The objector, however, was not permitted to see this report, though it played a crucial role in the disposition of his case. It was contended that the objector was thereby deprived of an opportunity to have the type of hearing contemplated by the Act. A divided Court in the *Nugent* case held that the denial of an opportunity to inspect the FBI report was not a denial of the statutory right to a hearing, provided the applicant was furnished a fair résumé of any

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adverse material in the report. A dissenting opinion pointed out the dangers in such proceedings: "The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense." *Id.*, 13.

Violation of procedural rules regulating the hearing may result in error so minor as not to amount to denial of a fair hearing in the constitutional sense. *Vajtauer* v. *Commissioner*, 273 U. S. 103. But where the error is so grave as to amount to a denial of procedural due process,* it can be corrected either by normal judicial review or by any other appropriate remedy, *e. g.*, by *habeas corpus*.** *Bridges* v. *Wixon*, 326 U. S. 135.

Failure to observe the rules of procedure established either by the Congress or by the agency itself may be ground for reversal. Those rules are designed "as safeguards against essentially unfair procedures" (see *Bridges* v. *Wixon*, 326 U. S. 135, 153); and their violation is reversible error if substantial interests are affected, even though the error does not reach the dignity of a constitutional question. Thus, in the *Bridges* case, departmental rules required statements of witnesses used in deportation proceedings to be in writing and made under oath. This rule was not complied with; and the testimony of a government witness made prior to the hearing was introduced in evidence even though it was

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*Cf. *Edison Co.* v. *Labor Board*, 305 U. S. 197, 226, where the Court held that while it was arbitrary and capricious for the agency to exclude certain testimony, the correction of the error lay in resort to a special provision of the Act authorizing the Court to supplement the record with additional testimony.

**For further discussion of the manner in which a violation of a constitutional guarantee is sufficient basis for *habeas corpus*, see the right to counsel cases in Lecture X.

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not made under oath. That was held to be reversible error, the Court saying:

"The importance of this particular rule may not be gainsaid. A written statement at the earlier interviews under oath and signed by O'Neil would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard—the fear of prosecution for perjury. Moreover, if O'Neil had been asked to swear to and sign the statements and had refused to do so, the fact of his refusal would have weight in evaluating the truth of the statements." *Id.*, 153.

Denial of the right to cross-examine on a vital issue may result in the administrative hearing being unfair. A case in point is *Reilly* v. *Pinkus*, 338 U. S. 269, where the postoffice closed the mails to an anti-fat remedy on the grounds of fraud. Experts for the government testified on the basis of medical text books and publications. But those experts were not allowed to be cross-examined on statements in other medical texts. The Court in holding this to be a violation of substantial rights said: ". . . one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnessses on the vital issue of his purpose to deceive." *Id.*, 276.

The decisional process may be important to a fair hearing. To take an extreme case, if the administrator makes his decision without reference to the record, or without reading it, he in effect abdicates his function and the party aggrieved is deprived of the hearing which the statute or the Constitution gives him. Hence it was held in *Morgan* v. *United States*, 298 U. S. 468, that the administrator, designated by Congress to make the orders, may not delegate to a subordinate the task of reading the record. The Court said:

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an

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order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

". . . For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear." * *Id.*, 480–481.

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*The Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 141, in the field of labor-management relations, attempts to prevent the agency from delegating its judicial functions. Section 4 (a) provides:

"The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations."

For a summary of the practices giving rise to this provision see S. Rep. No. 105, 80th Cong., 1st Sess., pp. 414–416.

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Where the government officer submits proposed findings of fact to the administrator, an opportunity must be accorded to the opposing party to examine them and object to them. *Morgan* v. *United States*, 304 U. S. 1. In that case, a full and fair hearing was held to include the right to notice of the precise charges leveled by the government against the citizen and the real issues presented to the administrator for decision. The Court stated:

"Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Id.*, 19–20.

While the procedure for a full and fair hearing is meticulous, the sanctity of the administrative decision and the processes by which it was reached is respected. The administrator, like a judge, may not be harassed by examination as to how and why he reached the decision he recorded. *United States* v. *Morgan*, 313 U. S. 409.

Judges are often disqualified from sitting in cases; and in that event they usually retire. Where bias is present, the requirements of fairness may indeed require reversal unless they do retire. This is especially true in criminal cases. These are matters I discuss in a subsequent Lecture. An administrative agency is not a court in the conventional sense. It usually renders no judgment, civil or criminal. Bias and prejudice may nevertheless disqualify commissioners, as well as judges. But their dis-

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qualification is an extreme situation. The fact that commissioners have expressed their view on the subject matter involved in cases before them has been held not to amount to a disqualification leading to denial of due process, if they sit.* *Trade Commission* v. *Cement Institute*, 333 U. S. 683, 702–703. The Court also held, in *Labor Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, that the fact that the hearing officer resolved all factual conflicts in favor of one litigant did not establish bias amounting to reversible error. The Court said:

". . . Yet it is not mere arithmetical chance which controls our present inquiry, for the facts disputed in litigation are not random unknowns in isolated equations—they are facets of related human behavior, and the chiseling of one facet helps to mark the borders of the next. Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. Accordingly, total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *Id.*, 659.

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*As stated in *United States* v. *Morgan*, 313 U. S. 409, involving an attack on the Secretary of Agriculture for bias in a decision he made:

"That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption." *Id.*, 421.

Cf Accardi v. Shaughnessy, 347 U.S. 260; 349 U.S. ——.

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In the last few decades there has been much complaint of the bias of administrative agencies. The criticism has centered largely on the failure to separate the investigative and prosecuting functions from the judicial function. Various groups or committees investigated the matter and made their reports and recommendations, all as summarized by the Court in *Sung* v. *McGrath*, 339 U. S. 33. The President's Committee on Administrative Management recommended a redistribution of functions within the regulatory agencies, saying: *

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*The Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 56 (1941), commented as follows:

"It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. In addition, an investigator's function may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding. For this same reason, the advocate—the agency's attorney who upheld a definite position adverse to the private parties at the hearing—cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide.

"These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor. For the disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those types of activity; and the problem is simply one of isolating those who engage in the activity. Creation of independent hearing commissioners insulated from all phases of a

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". . . the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.

"Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to it self." S. Doc. No. 8, 75th Cong., p. 68.

The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions. Section 5 (c), however, imposed strict requirements. Personnel can move from one division to another. But no hearing officer can be under the control of an investigating or prosecuting officer. And no one who investigates or prosecutes a case may participate or advise in the decisional process either in that case or in a factually related case. The hearing officer is barred from consulting any party unless on notice and opportunity for all parties to participate. The hearing

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case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation. A similar result can be achieved at the level of final decision on review by the agency heads by permitting the views of the investigators and advocates to be presented only in open hearing where they can be known and met by those who may be adversely affected by them."

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officer who presided at the reception of evidence must make the decision.*

This reform has done much to elevate the standards of the administrative agency in America, increase its prestige, and create public confidence in its impartiality and fairness.

Summary.

The administrative agency has arrived as a new and honorable member of the governmental hierarchy. It has great work to do in the modern world. It is indeed indispensable. Yet it has created new problems; and it has had its share of abuses and malpractices. Reforms of its practices have been numerous. Judicial surveillance over it has been close.** Yet, in spite of all the reforms and all

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*The Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 141, also attempts to separate the judicial from the investigative and prosecuting functions by providing for a General Counsel to exercise the two latter functions. See § 3 (d).

**There has been some tendency in America to leave less discretion to the administrative agency and to channel the disputes arising under a regulatory statute directly into the courts. The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201 is a recent example. It provided, with some enumerated exemptions, for minimum wages, maximum hours of work, and overtime pay; and it also regulated child labor. But this Act, unlike the ones creating most agencies, did not vest primary jurisdiction for construction, application, and administration of the Act in an administrative agency. As the Court said in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 616–617:

". . . Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was

And see 66 Stat. 711, 713 governing separation of functions within the Federal Communications Commission.

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the surveillance, abuses will continue when there is absent a high standard of the public service.

As the Senate Committee said respecting the Administrative Procedure Act: ". . . for most practical purposes it is to the agencies that the Congress and the people must look for fair administration of the laws and compliance with this bill. Judicial review is of utmost importance, but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted. Yet, in the vast majority of cases the agency concerned usually speaks the first and last word. For that reason the agencies must make the first, primary, and most far-reaching effort to comply with the terms and the spirit of this bill." S. Rep. No. 752, 79th Cong., 1st Sess. 31.

I think that in America great progress has been made in the evolution of the administrative agency as an honored institution.

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here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator."

The same tendency to rely more on courts and less on the administrative agency is illustrated to a degree by the Taft-Hartley Act (61 Stat. 136, 29 U. S. C.) and by the Administrative Procedure Act. The Court in *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 424, 490, said concerning the changes made by these Acts:

". . . the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds."

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APPENDIX

Administrative Procedure Act

DEFINITIONS

Sec. 2. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to im-

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plement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

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(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with

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published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

Rule Making

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States of (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record

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after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the

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convenience and necessity of the parties or their representatives.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

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ANCILLARY MATTERS

Sec. 6. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed cost, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or

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showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the

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agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplication of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

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DECISIONS

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or, (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions,

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and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sanctions and Powers

Sec. 9. In the exercise of any power or authority—

(a) In General.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

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JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so re-

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quires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and

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competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

Construction and Effect

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with

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the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

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TAGORE LECTURES

VI

The Commerce Clause: Its Reach and Its Limitations

Introduction.

The Constitution of the United States is not a prolix document. Words are sparingly used; and often a single phrase contains a vast arsenal of power. That is true of the words: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This is the Commerce Clause contained in Article I, Section 8 of the United States Constitution. It is the fount and origin of vast power. It has exerted as great an impact on the American economy as any power, apart from the War Power.

The noted Indian advocate, M. Ramaswamy, has stated in his treatise *The Commerce Clause in the Constitution of the United States:*

"The Commerce Clause forms the keystone of the arch on which the commercial prosperity of the nation is made to rest." *Id.*, 7.

The Commerce Clause came before the Court in 1824 in the famous case of *Gibbons* v. *Ogden*, 9 Wheat. 1. The narrow issue in the case involved only one main question, whether Congress had the power to pass regulations governing the navigable waters of the nation. If it did, then the appellant would win, for he claimed a

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license under an Act of Congress regulating coastwise shipping, a license which New York tried to nullify by giving a monopoly to the appellee. If Congress had the power to regulate shipping in navigable waters, its law would supersede New York's by reason of the Supremacy Clause of the Constitution, contained in Article VI, which provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Chief Justice John Marshall, writing for the Court, held that by reason of the Commerce Clause Congress had the power to regulate shipping in the navigable waters of the nation, that it had done so, and that by reason of the Supremacy Clause New York's conflicting regulation must fall.

Marshall gave the following definition: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." 9 Wheat. 189–190.

A debate has been in progress over what the words "Commerce . . . among the several States" mean. A recent book, *Politics and the Constitution* by Professor William W. Crosskey, published in 1953, explores the subject in a stimulating and uncommonly suggestive manner. His analysis of the reach of the Commerce Clause is too involved and detailed to recapitulate here. In sum, he concludes that "commerce" means any gainful activity; and that "among the several States" means among the people of the country. The power of Congress, in other words, extends not only to traffic, trade, and business extending across state lines, but to the internal commerce of the nation as well. Under Crosskey's anal-

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ysis, Congress could enter fields seldom dreamed of up to this time. Under his view, Congress would have the power to pass a uniform Negotiable Instruments Act applicable to all commercial transactions in the nation, whether or not interstate, a Uniform Sales Act covering all sales, both local and interstate, and a Uniform Corporation Law requiring the incorporation even of the corner grocery store that neither buys nor sells in interstate commerce.

I do not stop to comment on the Crosskey theory nor to evaluate it. For this Lecture, it is sufficient to note that from the beginning a more restricted construction was given to the Commerce Clause.

In *Gibbons* v. *Ogden*, Marshall wrote that "among" means "intermingled with." 9 Wheat. 194. "A thing which is among others, is intermingled with them." *Id.* What of commerce wholly within a State?

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.* And so Marshall concluded that the word "among" is restricted "to that commerce which concerns more States than one." *Id.* Marshall added:

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." *Id.*, 195.

The United States is a federation of sovereign States, each delegating to the central government power that sovereigns normally enjoy. Thus the federal government

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is one of limited authority only. Some powers are denied the States: *e. g.*, the right to make treaties or coin money; the authority to pass bills of attainder, *ex post facto* laws, laws impairing the obligation of contract; the power to grant titles of nobility; the right to lay imposts or duties on imports or exports—all as provided in Article I, Section 10. All residual authority, *i. e.*, all authority not delegated to the federal government, is retained by the constituent States.

The Tenth Amendment, which contains those reserved powers, is in general language: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is around the Tenth Amendment that the historic legal battles involving states' rights have been fought both in the Congress and in the courts of the United States.

In general, the powers reserved to the States and the people under the United States Constitution are of the kinds which are granted to the States of India by the State List (Article 246, Seventh Schedule, List II) and those which are granted to the federal government and the state governments concurrently by the Concurrent List (Article 246, Seventh Schedule, List III). The comparison is not entirely accurate, because under the Indian Constitution some powers granted the federal government by the Union List (Article 246, Seventh Schedule List I) are essentially local matters reserved to the States under the Constitution of the United States. Over some of these Congress may, as we shall see, exercise concurrent jurisdiction (such as insurance, stock exchanges, and futures markets). Over others, the Tenth Amendment reserves exclusive power to the States (such as the nature and amount of corporation taxes and the jurisdiction and powers of the state courts).

The State List and Concurrent List of the Indian Constitution mark the areas where the States are free to legislate. Moreover, India, like the United States, also

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has a Supremacy Clause in her Constitution, as we have already noted. Articles 251, 254. These provisions, like the Tenth Amendment and the Supremacy Clause in America, give rise to a host of problems in federalism.

As respects the problem presently being considered—commerce with foreign nations and among the States—the Indian Constitution allocates the power to the federal government by several entries on the Union List. These include the entries on railways, shipping and navigation, air navigation, broadcasting, import and export, and "inter-state trade and commerce," to mention only a few.

To return to the Constitution of the United States, the line which Marshall drew between the powers of the federal government and those of the local governments has mainly survived to this day. The federal government has power over "all the external concerns of the nation, and to those internal concerns which affect the States generally." The States have jurisdiction over affairs "which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."

The reserved powers of the States are commonly referred to as the police power. It is the police power that often clamors for recognition against assertion by Congress of its commerce power.

The clashes between the reserved powers of the States and the Commerce Power of Congress are among the most notable in American history.

A. *Producing Goods for Commerce.*

The power of Congress to regulate activities which are actually "in commerce" has long been recognized. The *Second Employers' Liability Cases*, 223 U. S. 1, involved the validity of the Employers' Liability Act, which was designed to mitigate some of the harsh rules of the common law relative to the liability of an employer for the negligent injury of his employees. Two of the

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cases involved locomotive firemen, while a third concerned an employee who was injured while replacing a drawbar on a railroad car. All of the employees were engaged in services for carriers who were in interstate commerce. In sustaining the validity of the Act, the Court stated:

"Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employes." *Id.*, 47.

This principle has since been applied in cases arising under the Employers' Liability Act. One such case is *New York Central R. Co.* v. *Porter*, 249 U. S. 168. There, a section-hand was struck and killed by a passenger train while shoveling snow between the tracks and a platform. The tracks were used for interstate commerce. The Court held it was clear that the employee had been "employed in interstate commerce" at the time of his death. See also, *Southern Pacific Co.* v. *Industrial Accident Commission*, 251 U. S. 259.

In *Southern Ry. Co.* v. *United States*, 222 U. S. 20, the Court upheld the validity of the Safety Appliance Act, which imposed a duty of equipping all trains used on any railroad engaged in interstate commerce with prescribed appliances, designed to promote the safety of the traffic and the employees engaged in its movement.

Other kinds of industrial activity presented more acute constitutional problems.

The factories and mines of America pour a vast volume of goods and commodities into the arteries of commerce that feed the markets of the nation. Can Congress control the conditions in those factories and mines? The question has been a highly controversial one in American constitutional law.

United States v. *Knight Co.*, 156 U. S. 1, was a civil suit to enjoin and unravel a vast monopoly. In 1890,

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Congress enacted the Sherman Act to protect interstate commerce from monopoly and restraints of trade. Thereafter, a New Jersey sugar corporation acquired the stock of four Pennsylvania sugar corporations. The resulting combine had a virtual monopoly of the sugar refinery business in the United States. The Supreme Court, in 1895, held, in an eight to one decision, that this combine was not an outlawed monopoly under the Act, since the acquisition of the shares of stock of the four Pennsylvania corporations "bore no direct relation to commerce between the States or with foreign nations." *Id.*, p. 17. Manufacture of sugar, said the Court, was distinct from trade or commerce in sugar.

The force of the Tenth Amendment and the power of those who spoke for states' rights ~~had~~ led the Court to a narrow and niggardly construction of the Sherman Act. The decision in the *Knight* case, though technically one of the construction of an Act of Congress, had ominous constitutional overtones. "Commerce succeeds to manufacture, and is not a part of it," said the Court. *Id.*, p. 12. And thus a vast domain was set aside for exclusive control by the States. It included manufacturing, mining, and all the other basic units of production. No matter how intimate their contact with commerce, no matter how profound their effect on it, they were for the States, not the Congress, to regulate. Monopoly was basically a problem for the States to regulate; monopoly was within the reach of the regulating power of Congress only when the instrumentalities of commerce were involved; and shares of stock or their acquisition were not instrumentalities of that character. That narrow view of the commerce power did not long endure. But it gave a tremendous impetus at the start of this century to the growth of great industrial combines in America.

A case having a further paralyzing effect on the power of Congress in the industrial field was decided in 1918. It was the famous case of *Hammer* v. *Dagenhart*, 247 U. S. 251, in which the Court, by a five to four decision,

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held a Federal Child Labor Act unconstitutional as beyond the reach of the Commerce Clause. At that time, child labor was rampant in some of the States and its evils were mounting. The problem involved matters of health, education, and juvenile delinquency. It was plain that child labor was a national evil; yet the influences of local mills and factories on local legislatures was so great that many States were failing to remedy the evil.

Few have ever contended that Congress had or has power to abolish child labor. For the qualifications of workers in local industries, the health and sanitation of factories, and the conditions under which people labor there are historic aspects of the police power, reserved to the several States. Those matters were, and are, as firmly entrenched in the sovereignty of the States as land reform is vested in the States under the Indian Constitution (Article 246, Seventh Schedule, List II, Eentry 18).

It had been assumed, however, that while Congress had no power to abolish child labor, it could close the channels of interstate commerce to goods made by child labor. The Supreme Court had upheld an Act of Congress, which made it a crime to transport a woman in interstate commerce for immoral purposes. *Hoke* v. *United States*, 227 U. S. 308. Control over the shipment of lottery tickets (*Champion* v. *Ames*, 188 U. S. 321), intoxicating liquor (*Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311) and impure food (*Hipolite Egg Co.* v. *United States*, 220 U. S. 45) had also been previously upheld. Why not products of child labor? The activity being curbed was no less obnoxious in the one case than in the other. But the Court, though acknowledging the power of Congress to put an end to the white slave traffic in interstate commerce, drew a distinction when it came to goods made by children. "The goods shipped are of themselves harmless," said the Court. *Id.*, p. 272. ". . . the production of articles, intended for interstate commerce, is a matter of local regu-

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lation." *Id.* If reforms were to be made in the factories of the nation, they must come from the States, not from the Congress. To hold otherwise, said the Court, would put an end to the federal system: ". . . all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and . . . our system of government be practically destroyed." *Id.*, 276.

Congress, thereupon, passed a law which placed an excise tax on all persons employing child labor for more than specified hours and days a week. The Court held that law unconstitutional, ruling that Congress could not do in the name of a tax what it could not do through means of a prohibition. *Child Labor Tax Case*, 259 U. S. 20.

It was apparent from the beginning that *Hammer* v. *Dagenhart* was aberrational. The power of Congress to prohibit shipments was one form of regulation that had been tried and upheld in earlier cases, as I have pointed out; and that type of regulation continued. Shortly after *Hammer* v. *Dagenhart*, the power of Congress over the transportation of stolen motor vehicles was sustained (*Brooks* v. *United States*, 267 U. S. 432). Then came the prohibition of the shipment in interstate commerce of kidnapped persons (*Gooch* v. *United States*, 297 U. S. 124) and convict-made goods (*Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334), both of which regulations were sustained. The barring of filled milk from commerce was also upheld in *United States* v. *Carolene Products Co.*, 304 U. S. 144.

The *Carolene Products* case did not mention *Hammer* v. *Dagenhart*. But it announced in broad terms a constitutional principle that the dissenters in the earlier decision had argued for. ". . . Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare . . . . Such regulation is not a forbidden invasion of state power

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either because its motive or its consequence is to restrict the use of articles of commerce within the states of destination . . . ." *Id.*, p. 147.

Carolene Products marked the demise of *Hammer* v. *Dagenhart*, though the event was not officially noted until several years later.

The erosion of the actual decision in *Hammer* v. *Dagenhart* is an interesting story. It is often the practice in Anglo-American jurisprudence to distinguish and qualify precedents, not to overrule them. They slowly become mere ghosts of their former selves, barely clinging to existence. Behind that process is a theory that the outward appearance of stability in the law is the important thing. Judge Jerome Frank has explained the phenomena in *Law and the Modern Mind*. He shows how it is, in law and in other fields, ~~that~~ men continue to chant about the immutability of a rule in order to conceal its transformation and to create the appearance of the stability and universality of a doctrine. Every people needs the feeling of security, of being anchored solidly to the past. And judges cater to that need.

But the error in the notorious child labor decision of *Hammer* v. *Dagenhart* was so transparent from the beginning that even its staunch supporters had little hope for its vitality. It did, however, linger in the books, radiating doubts about the constitutionality of vast projects which Franklin D. Roosevelt and his social engineers were designing for America in the troubled days following the depression of the early 1930's. It was a derelict in the stream of the law.

The impacts of *Hammer* v. *Dagenhart* on American constitutional law were many and varied during the 23 years of its life. A tracing of those ramifications would be time-consuming and perhaps of little interest except to those wanting a detailed autopsy. Suffice it to say that *Hammer* v. *Dagenhart* fitted the policy notions of many judges; and they were often in a strategic position to give those policy notions a tremendous impact on the new

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regulatory schemes that were emerging under the administration of Franklin D. Roosevelt.

United States v. *Darby*, 312 U. S. 100, involved the constitutionality of the Fair Labor Standards Act of 1938. That Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of goods and commodities produced in the United States under labor conditions which failed to conform to standards prescribed by Congress. The Act applied to industries engaged in commerce and also to industries engaged in the production of goods for commerce. The Act prescribed minimum wages for employees engaged in those activities and maximum hours of work. For example, the initial minimum wage was 25 cents an hour and the maximum hours of employment were 44 a week. (By 1954 the minimum hourly wage had been increased to 75 cents and the maximum work week reduced to 40 hours.) If an employee worked more than those hours, he was entitled to increased compensation for overtime. The Act also prescribed limitations on the use of child labor.

Congress, of course, did not undertake to fasten an industrial code on American industry. It merely made a federal offense of the wilful shipment in interstate commerce of goods, "in the production of which" any employee was paid less than the minimum wage or worked for longer than the maximum work week without the increased compensation for overtime. A like penalty was imposed on the shipment in interstate commerce of goods made by child labor.

It was argued that this control over production cut deep into the reserved powers of the States, as it sought to impose the standard of living of one part of the country on another, to eliminate substandard working conditions, and to equalize economic conditions by depriving low-cost producers of the advantages they enjoyed from cheap labor. These were, indeed, the objectives of the law.

Manufacture is not interstate commerce in the constitutional sense. But the great outpourings of American

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industrial plants move into the streams of commerce that tie the nation together into a vast network. Low-cost goods produced in areas not yet unionized compete in the interstate market with goods from high-cost areas. To stop the movement of those low-cost goods out of one State into another may deprive them of a rich market. But that might be the consequence, if the States were sovereign and not members of a federation. Then the exporting State would reach a customs barrier or control, once it passed its own frontier. Absent federation, the importing State could determine whether to admit or refuse the goods; and any reason would be a sufficient one, because of the complete command which the importing State has over its internal and external affairs. Under the American Constitution, a large measure of that control passed to the central government. After federation, the movement of goods and persons across state lines was a matter of national concern. Congress now sits astride the interstate trade routes. Subject to other constitutional limitations, Congress may now permit the full tide of commerce to move across the nation, bring it to a halt, allow it to proceed in trickles, or make certain that the goods that move are manufactured or mined under conditions that make for a healthy standard of living for all parts of the nation. That was the argument; and that was in essence the view of the Court in the *Darby* case. "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." *Id.*, p. 115. So wrote Justice (later Chief Justice) ~~Harlan Fiske~~ Stone in 1941 for a unanimous Court. The child labor provisions of the Fair Labor Standards Act were not in litigation in the *Darby* case. But the decision was wholly at war with the philosophy of *Hammer* v. *Dagenhart*. And so the *Dagenhart* case was explicitly overruled by *Darby*. So it was that a case that had long been a derelict was removed from the stream of the law.

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The *Darby* case was in a sense anti-climactic, for as I have said, by that time *Hammer* v. *Dagenhart* was hardly more than a ghost. I have indicated some of the prior and subsequent decisions that conflicted with its philosophy. Another such decision, this one by a divided Court, involved a rather vital part of Roosevelt's agricultural program. The Agricultural Adjustment Act of 1938 provided penalties for the shipment in commerce of surplus tobacco. The Court sustained the Act; the dissenting judges protested, relying on *Hammer* v. *Dagenhart* and contending that this new control amounted to an absolute prohibition and gave the central government effective command over agricultural production, plainly a local matter. But their voices were crying in a wilderness. *Hammer* v. *Dagenhart* was not followed. The Agricultural Adjustment Act was sustained. *Mulford* v. *Smith*, 307 U. S. 38. The repudiation of *Hammer* v. *Dagenhart* was therefore a foregone conclusion by the time the *Darby* case reached the Court.

Today, the *Darby* case is accepted and firmly established. Its doctrine is, indeed, the foundation for pervasive federal control of conditions in the factories, shops, and mines of America, if those factories, shops, and mines are producing goods and articles for shipment into the streams of interstate commerce.

The broad scope given the concepts "production of goods for commerce" and "necessary to the production thereof" is illustrated by two cases under the Fair Labor Standards Act: *Farmers Irrigation Co.* v. *McComb*, 337 U. S. 755, and *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173. The *McComb* case involved a mutual ditch company, a Colorado corporation which owned several reservoirs and a system of canals, all in Colorado. The sole activity of the corporation was the collection, storage, and distribution of water for irrigation purposes. The employees involved were field employees—ditch riders, lake tenders, and maintenance men—who handled the physical operation of the irrigation facilities, and the

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company's bookkeeper, who worked in the central offices in Denver, Colorado. All were held to be engaged in the production of goods for commerce.

One of the most extreme cases of this type is the *Martino* case. The employer was a Michigan corporation engaged in washing windows, painting, and similar maintenance work. This work was done within the State of Michigan and, for the most part, on the premises of the employer's customers. The greater part of this work was done on windows on the premises used in the production of goods for commerce. The Court held that the cleaning of the windows of industrial plants by its employees was "an occupation necessary to the production of the goods produced in those plants." The Court pointed out that if the work were done by employees of the industrial plants involved, they would come under the Fair Labor Standards Act, and the fact that an independent contractor was employed would not be permitted to change the result. And see *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.

The reach of the power of Congress in these fields is not determined by the Commerce Clause alone. There is the Necessary and Proper Clause, contained in Article I, Section 8, Clause 18 of the Constitution, which grants Congress power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The Necessary and Proper Clause has had many applications. *United States* v. *Ferger*, 250 U. S. 199, illustrates its use. That case involved an indictment under federal law for counterfeiting or forging a bill of lading purporting to represent an interstate shipment of goods. There was no commerce in the forged bill. But that was held irrelevant. It was sufficient that the bill of lading was an instrument of interstate commerce, an important

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if not indispensable adjunct of it. And so a purely local act comes under federal surveillance if it is a handmaiden of interstate activity.

B. *Affecting Commerce.*

The *Darby* case was not an isolated episode. It was, rather, part of a development on a wide front. For while the rule of *Hammer* v. *Dagenhart* was withering and the philosophy that prevailed in *Darby* was maturing, parallel growths in the commerce field were taking place.

Thus, in 1914, the Court gave expression to what has been known as the Shreveport doctrine, that being the name of a city in Louisiana.* The problem arose under the Interstate Commerce Act of 1887, by which a federal agency, the Interstate Commerce Commission, was established to fix rates and to eliminate abusive practices, including discriminatory rates. See Sharfman, *The Interstate Commerce Commission* (1931). One section of the Act made it unlawful for any common carrier to give "any undue or unreasonable preference or advantage" to any person or locality.

The complaint against the interstate carriers in the Shreveport case was that their rates favored local industry over out-of-state industry. These railroads ran from Louisiana to Texas. By one rail line Shreveport, Louisiana, is 40 miles from the Texas state line and 231 miles from Houston, Texas. By another carrier, Shreveport, Louisiana, is 189 miles from Dallas, Texas. Shreveport competes with both of those Texan cities for the trade of the intervening territory. The carriers fixed low rates out of Houston and Dallas to the intermediate points in Texas, and high rates to those same points out of Shreveport, Louisiana. It appeared, for example, that a rate of 60 cents carried first class traffic 160 miles eastward

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*The doctrine was foreshadowed in *The Minnesota Rate Cases*, 230 U. S. 352, 432–433.

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from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport, Louisiana. The rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents and from Shreveport, Louisiana, to Longview, 65.7 miles, was 35 cents. So it was, in instance after instance, that Shreveport, Louisiana, suffered a competitive disadvantage by reason of high interstate freight rates and low intrastate freight rates.

The Interstate Commerce Commission found that the discrimination gave an "undue preference and advantage" to the Texas cities, because there were no elements of cost and service that justified the difference in rates. The Commission, thereupon, ordered the carriers to desist from charging higher rates for carrying articles from Shreveport, Louisiana, into Texas than those charged for traffic from Dallas and Houston, respectively, for equal distances. That order could be complied with either by reducing the interstate rates from Shreveport, Louisiana, or by raising the intrastate rates to the interstate level or by lowering one and raising the other until equality was reached.

The Court sustained the order in *Houston & Texas Ry.* v. *United States*, 234 U. S. 342. The principle announced was as follows: ". . . Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." *Id.*, p. 353.

The power of the Interstate Commerce Commission to end these discriminations against interstate commerce was buttressed in 1920 by an amendment to the Act

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granting the Commission express authority to prescribe the *intrastate rate* which will remove the discrimination, even though a state commission may have established a higher or a different *intrastate* rate. Then started a long series of cases, involving the exercise by the federal agency of power to fix intrastate rates so as to put an end to discrimination against interstate commerce. The cases are too numerous and complex to summarize. They involve not the question of power to act but the propriety of the action taken. Thus, where there was discrimination against only some points in a State, the Court refused to sustain an order of the federal agency fixing *intrastate* rates for all points in the State. *Wisconsin Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579–580. Other orders of the federal agency fixing state-wide rates have likewise been held defective where the discrimination established related only to certain markets in the State. See *New York* v. *United States*, 257 U. S. 591, 600; *Florida* v. *United States*, 282 U. S. 194. In the latter case the Court ruled, "It would be an extreme and unwarranted assumption that to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida." *Id.*, 208. And so the Court has been insistent that the evidence be adequate and the findings sufficiently definite to sustain the imposition on a State of state-wide rates by the federal agency.

Interstate and intrastate commerce are often closely intertwined. One train will usually serve both *intrastate* and interstate passengers and grant each the same service and the same accommodations. The *intrastate* revenues have a profound effect on interstate rates. Twenty per cent of the gross freight receipts of American railroads have come from *intrastate* traffic and fifty per cent of the passenger receipts have come from that source. The ratio of gross *intrastate* revenue to interstate revenue has been about one to three. Once the *intrastate* rates are

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reduced, *intrastate* revenue may well fall off and an extra burden be put on the interstate phase of the business. If the railroads are to earn a fixed net return, the lower the *intrastate* rates, the higher the interstate rates may have to be. And so it was that Congress gave the Federal Commission authority to fix rates—both interstate and intrastate—that would give the carriers "a fair return" on the aggregate value of the railroad's property, its control over the *intrastate* rates being restricted to the removal of undue, unreasonable, or unjust discriminations against interstate commerce. See II Sharfman, The Interstate Commerce Commission, pp. 240 *et seq.*

The Court sustained that exertion of federal power over intrastate rates in *Wisconsin Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563. "Congress as the dominant controller of interstate commerce may . . . restrain undue limitation of the earning power of the interstate commerce system in doing state work . . . it can impose any reasonable condition on a States' use of interstate carriers for intrastate commerce it deems necessary or desirable." *Id.*, 590.

In that case Wisconsin had limited *intrastate* passenger rates to 2 cents a mile. The Interstate Commerce Commission, in order to make *intrastate* commerce pay its fair share of the operation of the railway system rendering the service, fixed a minimum for *intrastate* passenger fares at 3.6 cents per mile. The order was sustained as a means of "maintaining efficient regulation of interstate commerce under the paramount power of Congress." *Id.*, 590. The power of the State to fix the local rates with due regard to the minimum required by the federal agency was recognized.

The question of federal power having been established, the contests these days turn on the adequacy of the findings of the Interstate Commerce Commission to sustain its conclusion that new state-wide *intrastate* rates are necessary, if *intrastate* traffic is to pay its fair share of

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the cost of operating the interstate system and yield a fair return on the combined interstate and *intrastate* transportation service. The particularities of the records presenting those problems are too intricate and involved to present here. Many of the cases are close, as evident by the division among the Justices. *North Carolina* v. *United States*, 325 U. S. 507, is a recent example of a state-wide rate order established by the federal agency and set aside by a divided Court. In *King* v. *United States*, 344 U. S. 254, state-wide *intrastate* rates fixed by the federal agency were recently sustained by a divided Court.

Perhaps the most striking application of the Shreveport doctrine has been in the field of labor relations. We long had collective bargaining in the United States. The rights of labor to act in unison and to organize the shops and factories in which they worked gradually evolved in the Nineteenth Century. But the first nation-wide application of the principle with the authority of law behind it was made by the National Labor Relations Act of 1935. The constitutionality of that law came before the Court in 1937, in several cases, one involving a large steel company whose plants were located in Pennsylvania. *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1. These plants drew their supplies of coal and iron from several States and sent their products to the markets of the nation. Labor at these plants was organized; and several of the union leaders were discharged by the company for their union activities. The 1935 Act made discharge for that reason an "unfair labor practice" and gave the National Labor Relations Board authority to deal with the matter. The Board was authorized, among other things, to order the employer who committed such an act to cease and desist from that conduct, to reinstate the wrongfully discharged worker, and to pay him for the time he would have worked but for the unlawful discharge (see, *e. g.*, *Labor Board* v. *Seven-Up Co.*, 344 U. S. 344).

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If the employer disobeys the Board's order, the Board can move a federal court of appeals to enforce it. Thus the ultimate sanction of the Board's orders is the power to commit for contempt.

The Board, after hearing, entered that kind of order in the case of the steel company; and when the company failed to comply, the Board petitioned the federal court for enforcement of the order. That court denied enforcement, holding that the order was beyond the range of federal power.

The chief point in the case was not the adequacy of the findings, but the constitutionality of the Act as applied. That issue turned essentially on the phrase "affecting commerce" in § 10 (a) of the Act, which granted the Board power "to prevent any person from engaging in any unfair labor practice affecting commerce."

The stream of coal and iron moving to the plants of the steel company was interrupted by the manufacturing process. That interruption, it was argued, made the manufacturing process immune from federal regulation, at least so far as problems involving the organization of labor within the plants were concerned. It was conceded that employees who, for example, were crews of the trains moving coal and iron from one State to another were engaged in commerce for purposes of the Act. But the plant employees were in a different constitutional category, it was claimed.

The Court rejected the argument. The reach of the commerce power went beyond the category of employees actually engaged in interstate activities. It was pointed out that it is common knowledge that the stoppage of work in these steel plants by industrial strife and conflict has a serious effect on interstate commerce. The effect would not be indirect or remote; it would be immediate and perhaps even catastrophic. For the nation has experienced strikes which, though strictly local in the sense that they implicated only shops and factories and not

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interstate transportation systems, have nonetheless had a paralyzing effect on the national economy.

Thus the national regulation of labor practices was sustained as a legitimate exercise of the commerce power. If the intrastate labor practices have such a close and intimate relation to interstate commerce as to burden or obstruct it unless controlled, the Federal Board can act. Whether the particular action does affect interstate commerce in the sense defined by Congress was left to the Board for determination, case by case. The *Jones & Laughlin* decision upheld as constitutional the boundary Congress had fixed for the Board's action and the standards and procedure prescribed for it.

The extent to which the doctrine of "affecting commerce" has been developed since the *Jones & Laughlin* case may be illustrated by two cases. In *Labor Board* v. *Fainblatt,* 306 U. S. 601, the employer was engaged in processing materials into women's sports garments. The raw materials were supplied by a New York firm, and the finished goods were shipped to that New York firm or its customers throughout the United States. The Court held that a labor dispute in the processing plant would affect commerce, because it would interrupt the transportation of materials to the processing plant and of finished goods from the plant. Since the firm employed only 200 workers, it was contended that it was too small to have much effect on interstate commerce. The Court replied that while the firm was relatively small compared to such industrial giants as Jones and Laughlin, this factor was not controlling. "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." *Id.*, 606.

A more extreme case is *Labor Board* v. *Denver Building Trades Council,* 341 U. S. 675. A labor organization was engaged in a strike to force the general contractor in charge of erecting a commercial building to terminate its contract with a sub-contractor who was performing elec-

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trical work on the project. The sub-contractor purchased 65 per cent of its raw materials outside of Colorado, the State where the construction work was being carried on; and most of the merchandise it purchased in Colorado had been produced outside that State. The sub-contractor performed no services outside of Colorado, though it shipped some of its products outside of that State. The Court upheld the Board's determination that the practices involved might result in decreasing the flow of materials into Colorado from outside the State, during the period of construction, although the building itself, when completed, might be used only for local purposes. The Court ruled that the maxim *de minimis non curat lex* does not require the Board to refuse jurisdiction in such cases. *Id.*, 685.

The concept "affecting commerce" has been the cornerstone of many federal laws enacted by Congress in the last twenty years. The National Labor Relation Act of 1935 is one.

The Anti-Racketeering Act of 1934 made a felony of extortion by threats or coercion, where commerce is affected.

The Holding Company Act of 1935 which compelled simplification of public utility holding company systems and elimination of certain harmful features of such systems also rests in part on that source of power.

The Bituminous Coal Act of 1937 regulated the marketing of coal to prevent unfair methods of competition, including regulation of intrastate coal sales affecting interstate commerce.

The Civil Aeronautics Act of 1938 created the Civil Aeronautics Authority, granting it broad power to regulate air travel and included in its jurisdiction any operation or navigation of aircraft affecting commerce.

The Agricultural Adjustment Act of 1938, which provided marketing quotas and extensive regulation of agricultural production to avoid dislocations caused by farm

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surpluses, and the Agricultural Marketing Agreement Act of 1937, which provided for regulation of marketing of milk and certain other specified agricultural commodities, also rested in part on "affecting commerce."

And the 1939 Amendment to the Federal Employers' Liability Act established the liability of common carriers by rail to their employees who are injured in the course of their duties, where those duties affect commerce.

These are a few of the recent statutes where the Congress has employed this source of power under the Commerce Clause in order to broaden its regulation over trade and commerce.

The extent to which the concept "affecting commerce" has been applied is illustrated by *Wickard* v. *Filburn*, 317 U. S. 111, a case which many have thought went to the outside limits of congressional power under the Commerce Clause.

Under the Agricultural Adjustment Act of 1938, quotas of wheat acreages were alloted to farmers, pursuant to a program to restrict production to the needs of the market, in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Farmers could plant additional acres; but the wheat grown on the excess acreage was called a farm marketing excess and was subjected to a penalty of a specified amount per bushel. Filburn was a farmer to whom 11.1 acres were alloted for wheat to be harvested in 1941. He planted 23 acres, *i. e.*, 11.9 acres in excess of his allotment; and he harvested from that excess acreage 239 bushels. The marketing penalty at that time was 49 cents a bushel, which in Filburn's case amounted to a total penalty of $117.11. He sued in the federal courts to enjoin the officials from enforcing the penalty against him.

The Act defined "market" to include, in the case of wheat, "feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or

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exchanged, or to be so disposed of." In other words, wheat consumed on the farm and never reaching any conventional market was subject to the penalty payment if grown on excess acreage. Wheat that was eaten by chickens or pigs or consumed by the farmer at his table was treated the same as wheat sent into the vast stream of commerce reaching the nation's grain markets.

Filburn contended that this was a regulation of production and consumption of wheat, not of commerce in wheat; and that at best, production and consumption of wheat have only an indirect, not a direct, effect on commerce in wheat. The Court rejected that approach, saying that the economics of the problem supplied the answer to the question of constitutional law. The Court made plain by extended analysis that home-consumed wheat has a substantial effect on price and market conditions for wheat. That class of wheat overhangs the market and is induced by rising prices to flow into the market and check price increases. If never marketed, it supplies needs of the grower which otherwise would be reflected by purchases in the open market. The Court concluded: "Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Id.*, 128–129.

That case, decided in 1942, raised one of the most important questions of interpretation of the Commerce Clause the Court has faced. Divisions among the Justices distinguish the decisions in this field. But in this landmark opinion, written by the late Justice Robert H. Jackson, the Court was unanimous.

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C. *Restraints of Trade.*

It would take a volume to develop the law of restraints of trade as it has evolved in American law. Its origins, of course, go back to English law; and its amplification in America embraces a series of statutes, the chief of which are the Sherman Law enacted in 1890, the Clayton Act enacted in 1914, the Robinson-Patman Act enacted in 1936, and the Celler Anti-Merger Act, passed in 1950. Much of the law in this field relates to the types and character of restraint which are outlawed. An excursion into those matters would be long and detailed ~~and of no particular relevance to the Indian Bar and Bench.~~ It would involve such questions as the significance of size of industrial units, merger through acquisition of assets, merger through interlocking directorates and affiliated companies, price fixing, the division of markets among competitors, the use of patents to promote monopolistic practices, boycotts, picketing, and a host of other practices. As I have indicated, these are beyond the scope of the present lecture.

I think, however, that insight into the Commerce Clause and an understanding of its reach can be attained by looking at a few select cases arising under our anti-trust laws.

As discussed above, *United States* v. *Knight Co.*, 156 U. S. 1, gave the anti-trust laws a very restricted scope. It was decided under the Sherman Act, and put a blessing on a rather easy way of building industrial empires. As noted, a New Jersey corporation engaged in refining and marketing sugar, acquired the stock of four Pennsylvania sugar corporations. The resulting combine had a virtual monopoly of the sugar refining business in the United States. The Supreme Court held that this monopoly was not banned by the Sherman Act, since the manufacture of sugar was a local, not an interstate, activity, and since the merger of these sugar companies under one owner-

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ship and control had no "direct relation" to interstate or foreign commerce. The decision was an amazing one, since it would be apparent to any housewife, buying sugar from the interstate streams pouring from these refineries, that the existence of the monopoly would have a powerful influence on the price. Certainly the economists knew what the Justices overlooked, that the price of a commodity is a great regulator of its market.

The *Knight* case was decided in 1895. In ten years, however, the Court was beginning to narrow its application and distinguish it on its facts. In 1904, *Northern Securities Co.* v. *United States*, 193 U. S. 197, held that a holding company that acquired control of two competing railroads, thus stifling competition between them, was illegal under the anti-trust laws, though the holding company itself did no more than hold the shares of the two roads. Intrastate activities which "directly or necessarily" operate in restraint of interstate commerce were brought within the ban of the anti-trust laws. *Id.*, 331. And see *Standard Oil Co.* v. *United States*, 221 U. S. 1, 68–69; *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 408. By 1925, the *Knight* case had disappeared into the limbo and a new constitutional doctrine had taken its place. Under the new view, Congress had broad power to punish or control practices, whether by employers or by employees, which had an effect on interstate commerce. As stated in *Coronado Co.* v. *United Mine Workers*, 268 U. S. 295:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." *Id.*, 310.

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The modern conception of interstate business is perhaps best illustrated by *United States* v. *Underwriters Assn.*, 322 U. S. 533, which held that a group of fire insurance companies that combined to fix premium rates and agents' commissions violated the anti-trust laws. The writing of a fire insurance policy—the making of the contract—usually is wholly a local matter, intrastate in character. It had long been assumed that the business was, therefore, beyond the reach of Congress and subject to regulation by the States only. See *Paul* v. *Virginia*, 8 Wall. 168. But in the *Underwriters* case, the Supreme Court, while recognizing that the States had a large measure of constitutional control over the fire insurance business, held that it was nonetheless an interstate business, subject to regulation by Congress. The modern concept of interstate commerce is shown by the Court's description of the fire insurance business:

"The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. Its total assets exceed $37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

"This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integra-

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tion of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state." *Id.*, 539–542.

The modern law on the character of the restraints that are banned by the anti-trust laws reflect the broad sweep of the Commerce Clause.

Purely local acts may stop the interstate stream of commerce or obstruct it or reduce its volume or in some manner affect it. These acts—if they are of the character of acts condemned—all come under the ban.

A few cases will illustrate the vast reach of the Commerce Clause under its modern construction.

Mandeville Island Farms v. *American Sugar Co.*, 334 U. S. 219, was a case where a group of sugar refineries, doing an interstate business, conspired to fix uniform prices to be paid to growers of sugar beets in California. These refineries were the only practical market for beets

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grown in that area. As a result of the conspiracy, the price to the sugar beet farmers in California was reduced. The Court held that in an integrated industry, such as sugar refining, the stabilization of prices paid for the raw material tends to reduce competition in the finished product.

"Those monopolistic effects not only deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision; they also tended to increase control over the quantity of sugar sold interstate. . . ." *Id.*, 242.

In other words, local price fixing had its effects throughout the entire interstate industry and had a substantial relation to competition among the members of the interstate industry.

A manufacturer of tin cans, used in the packaging of food, sold its cans to two competitors in the canned food business. These competitors were engaged in interstate commerce. The manufacturer favored one of the competitors with a handsome discount not granted the other. This was held to be within the purview of the anti-trust laws, in *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245. "The effect of the discrimination is to substantially lessen competition, and its tendency is to create a monopoly, in the line of interstate commerce" in which the two canned food companies compete for business. *Id.*, 253.

There are myriad ways in which manufacturers by their sales practices can favor one customer over another and give him an advantage in the interstate market over his competitor. One of the most involved and intricate methods of discrimination was the basing-point system of pricing used by manufacturers. It came before the Court in *Corn Products Co.* v. *Commission*, 324 U. S. 726. This manufacturer sold glucose to makers of candies and confections. The price of glucose was computed by adding to a base price at Chicago, Illinois, the published freight tariff from Chicago to the delivery points, even though some deliveries were in fact made from factories

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at Kansas City, Missouri, which is several hundred miles to the west of Chicago. Candy companies located near Kansas City would thus be at a substantial disadvantage, as compared with candy companies located near Chicago. They would pay a phantom freight rate and add it to their costs and then meet in the interstate market their competitor whose business location was favored by the basing point. The evidence showed that the price system is crucial in the candy business. Customers may be diverted from one manufacturer to another by a difference in price of a small fraction of a cent per pound.

The restraint of trade may touch an interstate marketing agency such as a securities exchange, a grain futures market, or a stockyard where cattle and sheep are sold. The sales and purchases in those markets are local. But those sales and purchases are mere incidents to the flow of great streams of commodities or articles of trade that pass from one State to another through central markets in Chicago, San Francisco, New Orleans, New York City, and other great trade centers. The power of Congress over the rules for trading in these markets is well established. *Swift & Co.* v. *United States*, 196 U. S. 375; *Stafford* v. *Wallace*, 258 U. S. 495; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

The consequence of a restraint of trade may be local. For example, one person or company may acquire a monopoly of all billboards in a State, advertising goods of local merchants. Yet if instrumentalities of interstate commerce are used to promote the local monopoly, or if interstate business in articles used with the billboards, such as posters that are placed on them, is restrained, the activity falls under the ban of the anti-trust laws. *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255.

Distilleries of liquors and wines, doing an interstate business, conspired to fix local retail prices for their products in the several States. The combination used interstate transactions to carry out its plan. Some retailers did not buy interstate but obtained their inventory from

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local wholesalers. Yet the coercion brought to bear on the wholesalers through use of the mails and other interstate agencies was held, in *United States* v. *Frankfort Distilleries*, 324 U. S. 293, to be under the ban of the anti-trust laws, even though it was indirect.

A man with a theatre monopoly in one town may, through agencies of interstate commerce, use the leverage of that local monopoly as a trade weapon against his competitor in another town of the same State or in towns of another State. The fact that the end product is a series of local monopolies is unimportant, so long as the enterprise was created through interstate transactions or the monopoly sustained by them. *United States* v. *Griffith*, 334 U. S. 100.

Lorain Journal Co. v. *United States*, 342 U. S. 143, involved a local newspaper publisher who refused to accept local advertising from those who advertised over a local radio station which had invaded his monopoly over mass advertising in the area. The purpose of the publisher was to destroy the broadcasting company. The publisher's out-of-state circulation amounted to a small fraction of its total business, but it published substantial quantities of national and international news, shipped to it from various parts of the world. It carried a substantial amount of national advertising from out-of-state sources. The radio station also disseminated news and other materials obtained from other States, and carried national advertising. The Court held that the conduct constituted an attempt to monopolize interstate commerce, pointing out that the distribution locally of such news and advertisements transmitted in interstate commerce for the sole purpose of profitable reproduction and distribution was an inseparable part of the flow of the interstate commerce involved. Thus, the restraint on local trade was achieved through the use of interstate mechanisms, and the provisions of the Commerce Clause and the Sherman Act applied.

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In *United States* v. *International Boxing Club*, 348 U. S. 66, decided in 1955, the Court rendered another important decision on the scope of the antitrust laws by holding that the promotion of professional boxing contests, the revenues from which were largely derived from radio, television, and motion picture rights (involving interstate transmission) constituted interstate commerce and was, therefore, covered by the antitrust laws. The Court, speaking through Chief Justice Warren, pointed out that the business may have interstate ramifications though a boxing match itself is a local affair.

In sum, the reach of the Commerce Clause is sufficient to include local restraints that have an effect on the free flow of interstate trade or commerce.

It includes restraints on or monopoly of local trade effected through the use of interstate mechanisms or interstate commercial transactions.

It includes discriminatory sales to purchasers who compete in interstate commerce.

In other words, it includes the use of interstate activities to restrain local trade or the use of local devices to injure or impair interstate commerce.

In 1954, the Supreme Court went further and in the significant case of *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, held that the destruction of a local competitor by purely local tactics may also fall under the ban of the anti-trust laws. There was a small bakery business in Santa Rosa, New Mexico, run by Moore. Mead had a bakery business in New Mexico and in Texas. Mead also sold bread in Texas from its New Mexico bakery. Mead started a price war against Moore in Santa Rosa, slashing the price of bread so low that Moore was soon driven out of business.

Mead's price cutting was held by a unanimous Court to violate the anti-trust laws, even though all of the sales in the price war were local sales and even though no instrumentalities of interstate commerce were used to destroy Moore. The Court, after making those observa-

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tions, said, "But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business." *Id.*, 119–120.

So far as competitive practices are concerned, the *Moore* case is probably as far-reaching as any decision under the Commerce Clause.

D. *Navigation.*

I note that the Indian Constitution puts on the Union List, "Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest." Article 246, Seventh Schedule List I, Entry 56. I also note that shipping and navigation "on inland waterways" and "on tidal waters" are under the control of the central government. *Id.* Entries 24, 25.

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In America, the power of Congress over the vast hydro-electric projects we have already built and those that are under way or planned rests largely on the Commerce Clause. I use the word "largely" because Congress has authority under the War Power to erect dams and hydro-electric power plants. I indicated in an early Lecture how great an arsenal the War Power is. It reaches into economic, financial, fiscal, industrial, and social affairs as well as into military matters. The War Power, as well as the Commerce Power was used in sustaining the Tennessee Valley Authority. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326–330.

But the main development of the law on this subject has been under the Commerce Clause. A river is a highway for travel between States—at least it could be such, if it were navigable. Hence, as Chief Justice Marshall, speaking for the Court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 190, held, the power of Congress under the Commerce Clause extends to the navigable streams of the nation.

The aftermath of that holding has been profound. It first brought to the Court controversies over whether particular rivers were navigable. If a stream is navigable, the power of Congress over it is absolute. It may remove obstacles to navigation or allow them as it chooses. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421; *South Carolina* v. *Georgia*, 93 U. S. 4; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. It may license structures in the navigable waters or determine who may utilize the flow of the stream for traffic or for the generation of energy. *United States* v. *Appalachian Power Co.*, 311 U. S. 377.

The test of navigability is not whether the river in its natural and ordinary condition may be used as a waterway. "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." *Id.*, 407. Thus a stream may not in fact be navigable at

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present; yet if it can be made so, it is in the federal domain. "The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." *Id.*, 408.

The generous scope given the power over navigation by the Court is indicated in the *Appalachian Power* case, which dealt with New River, a waterway running through Virginia and West Virginia. Two courts had held the river non-navigable and therefore not subject to regulation by Congress. The Court set aside those concurrent findings. The improvements that need be made, if navigation is to be practical, may be great. Yet that is no deterrent:

"Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. . . . There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents. The plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce." *Id.*, 408–409.

Absence of use of the river as a waterway for a long time, or a use that was small and even inconsiderable, is not fatal: "The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because

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of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." *Id.*, 409–410. And see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288.

The States may own the bed of the navigable waterway; or the riparian owners may own it. That depends on state law. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60. But the running water, the flow of the stream, is in the federal domain. In the *Chandler-Dunbar* case, the Court said, "Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." *Id.*, 69.

This is not the place to trace the details of the development of that doctrine. At one stage the Court receded somewhat from the position. See *United States* v. *Cress*, 243 U. S. 316. But later it reclaimed the ground lost. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592; *United States* v. *Commodore Park*, 324 U. S. 386.

Today, it is settled as a matter of constitutional construction that Congress and Congress alone has dominion over the navigable streams, a dominion so complete that it is not responsible to riparian owners for engineering projects that impound water between low and high water marks or otherwise regulate its use between those marks. *United States* v. *Commodore Park*, 324 U. S. 386. Cf. *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799.

Congress alone has dominion over the water power inherent in the flowing stream and can exclude riparian owners from its use without compensation. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424.

Congress can license the use of the flowing water to private companies; or it can provide for the exploitation of these river resources by public power projects. Congress has, indeed, done both, some of the largest hydroelectric projects being under public management. Notable in that group are Grand Coulee, McNary, and Bonneville on the Columbia, and Hoover on the Colo-

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rado ~~dams which rank favorably with some of the major projects under way in India.~~

In America, as in India, hydroelectric dams are multi-purpose. They serve the ends of irrigation, flood control, and the generation of electricity. The problems of flood control are often dominant in the engineering plans behind the American projects. Hydroelectric energy and irrigation may be a by-product. Or some other purpose may be the main one. Once the engineering scheme is hitched to the Commerce Clause, the fact that purposes will be served that could not alone be served under the Commerce Clause is not important. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 533, 534.

The broad scope of the power under the Commerce Clause is indicated by the Court's rulings on flood control contained in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. The Mississippi River, running from north to south for 2,500 miles, is a great artery of interstate commerce. It is navigable; so are many of its tributaries. But it has hundreds of tributaries that are not navigable. Yet if flood control of the Mississippi were to be successful, some control of the tributaries, whether navigable or non-navigable, was necessary. And so the Court ruled. ". . . just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries." *Id.*, 525–526.

The power of Congress over navigable streams has evolved to a point never dreamed of, perhaps, by Chief Justice Marshall. The details of the evolution show, perhaps as well as the history of any other constitutional principle, how the changing needs of oncoming generations have their impact on law, how old precepts are put to new and greater uses, as social, economic, engineering, and political wisdom increase.

One of the most significant trends in recent American history has been toward the centralization and expansion

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of the activities of the national government. I noted earlier how two World Wars and the federal income tax have accelerated that trend. But the complexities of the domestic economy have also substantially contributed to that development.

The problems of the Twentieth Century have frequently been nationwide in character, and their solution has required national action.

The need for action by the Federal Government has, in turn, led Congress to make fuller use of the great sinews of national power contained in our Constitution. One abundant source of such power has been the Commerce Clause.

The utilization of that clause has, at times, been blocked by judicially created obstacles, such as *Hammer* v. *Dagenhart*. But the barriers have, in time, been removed, as the *Darby* case illustrates. Today, the power of Congress to regulate the transportation of goods in interstate commerce and thereby to influence the conditions under which those goods are produced is undisputed.

The Necessary and Proper Clause, coupled with the Commerce Clause, furnishes Congress with a wide latitude in choosing the appropriate means for making its regulation effective.

The concept of "affecting commerce" has furnished a basis for federal regulation of many activities which, though not themselves commerce, have a substantial effect, either individually or cumulatively, upon commerce.

Together, these doctrines have served as the basis for a host of regulations which reach every segment of our economy—labor legislation to protect the rights of working men and avoid industrial strife; agricultural controls designed to curb the farmers' cycle of "boom and bust"; anti-trust laws to curb oppressive practices of predatory business; laws to keep our securities markets honest and reliable; laws to protect our transportation systems and the people who use them, to mention only a few. In

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addition, our vast hydroelectric projects that serve also the ends of flood control and irrigation are hitched to the Commerce Clause. There is a great distance from those huge power projects to the wheat quotas for small farms. But they and the many gradations in between are all grounded on the Commerce Clause. That short clause does, indeed, contain an arsenal of power. It has done great service in creating one nation out of many States.

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TAGORE LECTURES

VII

The Commerce Clause: Federal *vs.* State Power

The Commerce Clause has a negative as well as a positive aspect. The Clause not only serves to augment federal authority. By its own force it also cuts down the power of a constituent State in its exercise of what normally would be a part of its residual police power. That is to say, the Commerce Clause often prevents a State from legislating even where Congress has passed no statute which collides with the state law. The Commerce Clause preempts a field in which Congress, and Congress alone, can act. The Commerce Clause, in other words, creates an area of free trade.

India's system is comparable. Article 301 of her Constitution provides, "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free." The Union List (Article 246, List I) sketches an exclusive domain for the central government. And, as we have seen, India's Supremacy Clause makes the federal law supersede state law not only as respects items on the Union List but also as respects matters covered by the Concurrent List (Article 246, List I and III), *i. e.*, where both the federal and the state governments may legislate. See Article 254 (1) and Article 251.

Both the positive and negative aspects of the Commerce Clause have grave importance.

Each State of the United States has delegated or relinquished power that sovereigns normally enjoy. The

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federal government is one of limited authority, enjoying only the sovereignty expressly granted or fairly or necessarily implied. Some powers are denied the States, *e. g.*, the right to make treaties or coin money, pass bills of attainder, *ex post facto* laws, or laws impairing the obligation of contract, the right to grant titles of nobility, and the right to lay imposts or duties on imports or exports, all as specified in Article I, Section 10. All other residual authority is retained by the constituent States, as provided in the Tenth Amendment.

It is that residual authority of the States that presses for recognition in a host of Commerce Clause cases. States' rights, *i. e.* the police power, become the staging ground for opposition to the constitutionality of federal regulation. Even when the right to federal control is clear, states' rights are used to support state legislation in the same field. It is then argued that a particular federal law should be narrowly construed, so as not to collide with a state law, or so as to leave room for complementary regulations of the same subject matter, by both state and federal agencies. In other words, the authority reserved to the States under the Tenth Amendment is used (1) to deny Congress authority to enact the challenged law; ~~and~~ or (2) to construe a federal law so it will be in harmony with complementary state legislation.

The arbiter of these claims of the opposing sovereigns is the Supreme Court, which, very early in American history, undertook by its decrees to place limits upon the authority of the States (*Gibbons* v. *Ogden*, 9 Wheat. 1, 197–209) and declare state laws transcending those limits unconstitutional. ~~*Marbury* v. *Madison*, 1 Cranch 137;~~ *Brown* v. *Maryland*, 12 Wheat. 419.

It was important, I think, that the Supreme Court undertake that role. For in a federal system there must be some referee between the conflicting claims of the national and local authorities. Otherwise, local interests exerting powerful influences on state legislatures would, in the long run, prefer home industries over those that

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are out-of-state, establish tariff barriers, or employ other means tending to Balkanize the nation into hostile trade areas. Theoretically, Congress could perform the role of referee by legislating in reference to conflicting state laws. But there are many state laws whose impact is obscure, until a specific application is made. Then the particular interest of an individual presses for recognition. Fines or jail sentences are imposed, goods are seized, or other invasions of individual rights are suffered. The claim being justiciable in character, and the controversy being real, not feigned, the case is suitable for adjudication by the courts. The federal courts have taken full advantage of the opportunities thus afforded them.

There have at times been ~~dissents from~~ protests against the judiciary assuming that power. Perhaps the most historic is Chief Justice Taney's dissent in *Pennsylvania* v. *The Wheeling Bridge Co.*, 13 How. 518, 579. In that case, he maintained that where Congress had not acted, the States should be free to legislate. The particular case involved a dispute over the maintenance of a bridge across a river which was in the national domain because it was a navigable stream. Taney thought that Congress, not the courts, should resolve the controversy, absent some specific grant of jurisdiction to the judiciary. He said, "In taking jurisdiction, as the law now stands, we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us. And such a discretion, when men of science differ, when we are to consider the amount and value of trade, and the number of travellers on and across the stream, the interests of communities and States sometimes supposed to be conflicting, and the proper height and form of steamboat chimneys, such a discretion appears to me much more appropriately to belong to the Legislature than to the Judiciary." *Id.*, 587.

That view, however, has not had many adherents in the Court. Today the federal courts entertain jurisdiction, both where a state law and a federal law collide, and

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where a state law enters a field which Congress might preempt but has not yet preempted.

It has sometimes been urged that the judiciary should use the Commerce Clause to strike down state legislation only where the state legislation discriminates against interstate commerce or is out of harmony with or collides with laws which Congress has enacted. See *McCarroll* v. *Dixie Greyhound Lines*, 309 U. S. 176, 183–189; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 795; *Morgan* v. *Virginia*, 328 U. S. 373, 386–387. But that view has not prevailed. The Court has quite consistently performed the role of arbiter or referee, not only to resolve conflicts between state and federal enactments and to review state law under a claim of discrimination, but also to determine whether a state law obstructed commerce, burdened commerce, or entered a field where Congress alone was entitled to legislate.

The entrance of the judiciary into these fields has necessarily involved it with large questions of policy. The great bulk of the work of the United States Supreme Court in this field concerns, indeed, the balancing of local interests against national interests.

The "exclusive" nature of the commerce power was first adumbrated by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, a case which led Dean Ribble to write in *State and National Power Over Commerce* (1937), p. 47, that "Judges legislate interstitially and the interstices were great in Marshall's time." What Marshall said in *Gibbons* v. *Ogden*, a *dictum* quite unnecessary to the actual decision of the case, was:

"When a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress and is doing the very thing which Congress is authorized to do." *Id.*, 199–200.

In the *Gibbons* case, there was a federal law regulating the commerce in question. So the *dictum* in its context merely meant that when Congress was regulating a par-

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ticular phase of interstate commerce, the States were precluded from exerting any control over it. But the *dictum* in its literal meaning had a broader scope; and it was soon applied. The rule emerged that even when Congress is "silent"—that is to say, even when Congress has enacted no federal law on the subject—the States may nevertheless be barred from any regulation of that particular subject by force of the Clause itself.

Marshall's *dictum* on the "exclusive" nature of the power of Congress over commerce did not, however, survive in its full vigor. By the middle of the nineteenth century it had been cut down and restricted. *Cooley* v. *Board of Wardens*, 12 How. 299, held that the silence of Congress did not preclude all state laws that regulated interstate commerce. The rule announced in the *Cooley* case is the one that in general has survived to this day: "Now the power to regulate commerce, embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation." *Id.*, 319.

The state law in question was an Act of Pennsylvania requiring vessels coming from or bound to a foreign port to receive a pilot in the Delaware River. This regulation, involving as it did the use of a port with whose waters the local experts were most familiar, was deemed to be of the kind that need not be uniform throughout the nation. Local regulation of pilotage, it was held, was not inconsistent with the requirements of national commerce.

The contests over state laws that infringe on the national domain did not abate after the *Cooley* case. But since then, the line has been drawn between fields that need uniform regulations and fields that do not.

There is one more preliminary matter that should be mentioned. The Indian Constitution contains, in Article

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303, a limitation on the powers of Parliament over commerce. That Article provides that neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorizing the giving of, any preference to one State over another, or making, or authorizing the making of, any discrimination between one State and another, unless it is necessary for the purpose of dealing with a situation arising from scarcity of goods. No such qualification of the power of Congress is contained in the United States Constitution; and it has never been necessary to determine if such power would be implied. It was, however, early decided that Congress, not the Court, has the final say on how free of state control the channels of commerce can or should be. Thus, in *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, a State had authorized a private company to build a bridge across the Ohio River. The Ohio, being a navigable river, is an artery of commerce over which Congress has paramount authority by virtue of the Commerce Clause. Congress had enacted no law regulating bridges over the Ohio. But the bridge in question was charged with offending against the free movement of vessels because of its low height. The Supreme Court eventually decided that the bridge should be abated, unless it were elevated to a specified height. Thereupon, Congress passed a law declaring the existing low bridge to be a lawful structure over the Ohio River. Once more the case reached the Supreme Court. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421. The Court sustained the Act of Congress, saying that the power to regulate interstate commerce includes "the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." *Id.*, 431.

This principle has been recognized over and again. It was restated in 1946 by the late Justice Rutledge in *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, "The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not

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"Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest."

The national policy, as formulated by Congress, may constitutionally bar all interstate commerce, allow it only under prescribed conditions, or permit the States to favor their local industries by making invidious discriminations against it. Congress has the final word, save as it is curtailed by specific constitutional prohibitions.

In short, when Congress has acted, the Court determines the meaning of the federal law. When Congress has not acted, the Court decides whether a particular state regulation is consistent with the area of free trade carved out by the Commerce Clause itself.

A. *Where Both Congress and the States Legislate.*

Congress, when it legislates on a matter of national concern, may specifically provide that the federal law shall not abrogate or nullify any state law dealing with the same subject. Such was the case in *Hartford Indemnity Co.* v. *Illinois*, 298 U. S. 155, where both the federal government and the State of Illinois regulated those engaged in the commission business handling farm produce. Both laws accordingly were given effect. For as I have said earlier, Congress can sanction a multiplicity of regulations over interstate or foreign commerce or bar any whatsoever.

Federal regulation of a subject matter may be partial only, leaving untouched one or more phases of the business or activity to which complementary state law is sought to be applied. Two cases illustrate the modern trend of decision: *Kelly* v. *Washington*, 302 U. S. 1 and *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177.

It appeared in the *Kelly* case that Congress had provided for the inspection of certain classes of boats plying the navigable waters of the nation, but had not extended

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it to vessels of other types and classes. The State of Washington invoked its inspection laws as respects the latter kind of vessels, and was sustained by the Court.

The *Barnwell* case involved the constitutionality of a South Carolina law, prohibiting on the highways of that State motor trucks and trailers wider than 90 inches and heavier than 20,000 pounds. A federal law regulated interstate trucks, requiring of operators certificates of convenience and necessity that defined their routes and specified the commodities they might carry. But the federal law contained no specifications concerning the size and weight of the trucks used in these interstate movements. South Carolina was, therefore, permitted to determine the specifications for the trucks that traveled her highways. See *Maurer* v. *Hamilton*, 309 U. S. 598.

In the *Kelly* case the Court concluded that while Congress in the interests of uniformity could establish standards and designs for the structure and equipment of vessels and the States could not enter that field, inspection was different. It held that a State has as legitimate an interest in controlling unsafe vessels, as it would have in safeguarding the public against diseased animals or unwholesome food. Safety is an intensely local affair, a matter deep rooted in the police power. In the *Barnwell* case, safety was also a dominant consideration in sustaining the local law. Size and weight of motor vehicles have an important relation to safety. They have, moreover, an immediate bearing on one of the most historic functions of municipal government—the design, construction, and maintenance of roads.

It has often been said that a state law cannot survive a federal law, if Congress has "occupied the field." That concept has little utility in analyzing the cases, for crucial questions remain as to what "the field" is and what "occupies" means. A more profitable inquiry is an analysis of the two regulatory schemes—state and federal—to determine if the two can live comfortably together without clash or inconsistency and, if they can, whether it was

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the design of Congress that they do so. If, as in the *Kelly* and *Barnwell* cases, the state law touches on phases or aspects of a business that the federal law leaves unregulated, the modern tendency is to let the state law survive, meshing it with the federal law, the two functioning as parts of an harmonious whole.

The cases are almost myriad and too numerous even to list. I will mention only a few that are illustrative: In *Merchants Exchange* v. *Missouri*, 248 U. S. 365, a state law regulated the weighing of grain, while a federal law merely established standards of quality of grain. The state law survived.

Missouri Pacific R. Co. v. *Norwood*, 283 U. S. 249 upheld a state law regulating the number of brakemen on interstate trains, since the Interstate Commerce Act—the federal law—while regulating many phases of interstate carriers, did not touch the number of employees for interstate trains.

In *Dickson* v. *Uhlmann Grain Co.*, 288 U. S. 188, Congress had regulated trading in grain futures. Missouri went further and made that activity illegal when it was sheer gambling and performed no market function. The Court upheld the state law, as not in conflict with the federal policy.

Though Congress has regulated labor relations in the interstate field, not all state laws touching that field have been superseded. Thus, room has been left for state regulation of picketing, since Congress did not legislate concerning it. See *Allen Bradley Local* v. *Board*, 315 U. S. 740.

Though the federal Labor Board was given power to forbid a strike when the *purpose* of the strike was illegal under federal law, it was given no power to forbid one because the *method* of conducting the strike was illegal. A union adopted a plan of rather frequent work stoppages, made necessary by the calling of union meetings. This practice was held to be within the power of Wisconsin to regulate, even in face of the provision in the

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only the price of sales of gas for resale, not the price of sales made direct to industrial consumers. State regulation of the price of industrial sales would therefore be permissible. But the Court went much further. It held, in *Panhandle Co.* v. *Michigan Commission*, 341 U. S. 329, that an interstate pipeline company could be required to get a certificate of convenience and necessity from Michigan in order to make industrial sales in Michigan, that Michigan constitutionally could say that a certificate obtained from the federal agency was not sufficient.

In *Buck* v. *California*, 343 U. S. 99, California was permitted to exact a permit from a carrier engaged in foreign commerce (with Mexico), in spite of the fact that federal law regulated carriers doing such business. But since the federal regulations established mere minimum standards and the state standards were not inconsistent with them, the state system of regulation was allowed to be superimposed on the federal system.

Perhaps the most extreme case of this type is *California* v. *Zook*, 336 U. S. 725. Federal law required a permit from a federal agency for a person to operate a travel bureau arranging transportation in foreign or interstate commerce. California made the violation of the federal regulation a violation of state law also. The Court sustained a prosecution under the state statute against a claim that prosecution under both statutes would often result in greater punishment than the maximum permitted by the federal law. The seriousness of that claim is emphasized by the fact that the defense of double jeopardy does not bar a federal prosecution for the precise act that a State has previously punished. See *United States* v. *Lanza*, 260 U. S. 377. Therefore, overlapping statutes of the kind involved in the *Zook* case are usually read so as to avoid two punishments for one act. See *Jerome* v. *United States*, 318 U. S. 101. Yet in the *Zook* case, the traditional interest of the State in this field was so strong and the manner in which the state law buttressed

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federal enforcement so plain, that a majority of the Court allowed the state law to stand.

Certain phases of a state law often collide with the federal policy. Two recent examples in the labor field illustrate the problem. In *Hill* v. *Florida*, 325 U. S. 538, the Court struck down a Florida law regulating a union's choice of a business agent, since it interfered with the "full freedom" of workers in the selection of their bargaining representatives guaranteed by a federal Act.

Amalgamated Assoc. v. *Board*, 340 U. S. 383, invalidated a Wisconsin law providing for compulsory arbitration of labor disputes in public utilities, since this conflicted with the right of the employees to strike, which had been expressly safeguarded by the federal Act.

The conflict between federal and state policy may be less explicit. The failure of the federal administrative agency to act may indicate, as clearly and plainly as any affirmative action, not the absence of power, but a decision that a particular practice contravenes the federal policy. Thus it appeared in *Bethlehem Co.* v. *Board*, 330 U. S. 767, that the federal agency had treated foremen's unions as inappropriate collective bargaining units under the federal Act. New York was therefore not allowed to sanction those unions in industries subject to the federal law.

Rice v. *Santa Fe Elevator Corp.*, 331 U. S. 218, illustrates how Congress may act so unequivocally as to make clear that it desires no regulation of the subject matter, except its own. In that case, the federal law was held to supersede a law of Illinois regulating the storage of grain, as to those particular phases of the business on which Congress had legislated, even though the federal regulation was not inconsistent with the state regulation. For example, Illinois fixed warehouse rates, while the federal law did not. The federal policy on rates was not fixing them, but controlling them through the issuance, suspension, or revocation of licenses. The purpose of Congress to make the federal scheme exclusive was divined

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from the circumstances surrounding the adoption of the federal law and its explicit legislative history.

Cloverleaf Co. v. *Patterson*, 315 U. S. 148, illustrates how preemption by a federal Act may sometimes be inferred from the nature of the legislative problem. That decision struck down an Alabama statute regulating renovated butter, because of the nature of the federal Act which regulated the manufacture and transportation of that kind of butter. State confiscation of butter that had passed federal scrutiny but fell short of the state standards was thought to be inconsistent with the federal scheme, even though the state remedy was in a sense only ancillary to federal control.

An even clearer example, taken from another field, is *Hines* v. *Davidowitz*, 312 U. S. 52. That case involved an alien registration Act of Pennsylvania. Congress had also passed an alien registration Act. Though the two Acts might, as a practical matter, have been administered so as to be wholly compatible, the state law was struck down. Congress, it was held, had prescribed the method of registration that was consistent with the national and international interests of the United States; the treatment of aliens often involves delicate problems of foreign relations; and the federal government alone is responsible for the conduct of foreign affairs. Therefore it was important to have a single regulatory scheme for aliens, and that one, the federal system.

Of the same tenor were the earlier *Passenger Cases*, 7 How. 283, where New York and Massachusetts sought to collect head taxes for each alien landed in the ports of those States from ships coming from abroad. The States argued that these taxes were fees for inspecting the newly arrived boats and passengers, as a safeguard against disease and as a means of providing some security to the States against the influx of paupers who might become public charges. These defenses were rejected by a majority of the Court. Congress, in providing for immigration to America, had prescribed no entrance fees for the

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extreme limits. Tariff and trade barriers were erected, which prevented a pooling of the resources of the nation. A few illustrations will suffice.

Missouri passed a law barring admission into the State of all Texas, Mexican, or American Indian cattle from March to November of each year. Though a State may prevent diseased cattle from entering its borders, the banning of all outside cattle was declared unconstitutional, even though Congress had not spoken. *Railroad Co.* v. *Husen*, 95 U. S. 465.

Years later, West Virginia passed an Act regulating the natural gas industry. It provided, *inter alia*, that consumers within the State were to be given preference over out-of-state consumers and that only surplus gas might be carried into other States. The Court held the law unconstitutional as an embargo against interstate commerce. *Pennsylvania* v. *West Virginia*, 262 U. S. 553. If West Virginia could keep its natural gas for itself, Pennsylvania might keep her coal, Washington and Oregon their lumber, Minnesota her iron ore, etc. That was the reasoning of the Court. The Court followed the reasoning of the earlier case *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, where the Court said: "In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." *Id.*, 255–256.

In the 1930's when there was a great depression in America, many indigent people moved west to California where warm sunshine reduced some of the rigors of existence. California countered this trend by making it a

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crime for anyone to bring into the State an indigent non-resident. All members of the Court held that Act unconstitutional. *Edwards* v. *California*, 314 U. S. 160. Some thought the right of free movement from State to State was an incident of national citizenship. A majority of the Court, however, rested their decision on the Commerce Clause, holding that this barrier to the transportation of people across a state line was an unconstitutional embargo.*

Embargoes against interstate commerce would be as effective barriers as the very destruction of a bridge over

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*That decision is reminiscent of Article 19 (1)(d) of the Indian Constitution: "All citizens shall have the right . . . to move freely throughout the territory of India."

This right of free movement in India is, however, subject to the imposition of reasonable restrictions in the interest of the general public. Therefore, the Government may, in some circumstances, issue orders of externment which prohibit the movement of an individual into, or his residence in, certain prescribed areas.

Such an externment order was upheld in the leading case of *Khare* v. *Delhi*, 13 Sup. Ct. Jour. 328. In that case, the petitioner was ordered to leave the Delhi District and not to return to it for a period of three months. Externment was pursuant to a state law which gave the government power to remove a person from any area if satisfied with respect to any particular person that his removal was necessary "to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order." Petitioner, who was President of the All-India Hindu Mahasabha, challenged the order as infringing his right of free movement under Article 19 (1)(d), claiming that it was based on efforts to suppress political opposition to certain Government policies. The Court stated that the test was whether the restriction on free movement was reasonable, both as regards the substantive aspects of the restraint and the procedure whereby it was to be imposed. The Court held that the fact that under the Act in question the power to make externment orders was in the discretion of the Government or District Magistrate did not make the Act unreasonable. The Court also rejected a claim that the grounds for the externment order were too vague. These grounds were, in part: "Your activities generally and particularly since the recent trouble in East and West Bengal have been of a communal nature tending to excite hatred between com-

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which an interstate railroad must run. In *Kansas Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, the Court did, indeed, prevent such a bridge from being torn down by order of a State that required its removal in order to assist flood control in a river basin.

Yet even the ban on embargoes against interstate commerce has exceptions. Protection of the States against the invasion of disease, pests, and plagues is the conspicuous one. *Mintz* v. *Baldwin*, 289 U. S. 346, is typical. The plaintiffs raised cattle in Wisconsin and sold them in New York. The latter State set up safeguards against importation of cattle with Bang's disease and to that end required that they and the herds from which they came be certified by the chief sanitary officer of the State of origin as being free of the disease. The New York regulation was upheld as an inspection measure, designed to prevent

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munities . . . your presence and activities in Delhi are likely to prove prejudicial to the maintenance of law and order . . . ."

Singh v. *Bombay*, 15 Sup. Ct. Jour. 321, involved an externment order directing the petitioner to leave Greater Bombay. The order was based on an Act which provided for externment orders by the Commissioner of Police whenever the act or movements of any person were calculated to cause alarm, danger or harm to person or property or where there were reasonable grounds for believing that such person was engaged or about to engage in certain specified offenses, and the Commissioner was of the opinion that witnesses were not willing to testify publicly against such person for fear of their safety. The maximum period of externment was two years; and any order could be canceled by the Commissioner if the need for it ceased to exist. The procedure provided that the externed individual would be informed of the allegations against him and give him a reasonable chance to explain, including a right to appear by counsel and examine witnesses to clear his character. There was no provision for cross-examining the witnesses against him. But the Court, in upholding the order pointed out that since the Act was based on the need to dispel the fears of such witnesses, its purpose would be defeated if a right to cross-examine them were afforded.

Externment orders in America have been sustained only in the extremities of war, as indicated by the Japanese cases discussed in Lecture I.

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the spread of the disease and to safeguard the public health.

A converse case illustrates the same principle. In *Sligh* v. *Kirkwood*, 237 U. S. 52, Florida was permitted to prevent shipment out of the State in interstate commerce of citrus fruits that were immature or otherwise unfit for consumption. The export of low-grade, inferior fruit was controlled in the interests of promoting the prestige of the citrus industry, so important to the economy of Florida.

These types of embargoes indicate the range of control which the States, with the approval of the Court, have laid on imports into and exports from a State. But in recent years the Court has gone much further. In the extreme case of *Breard* v. *Alexandria*, 341 U. S. 622, a sharply divided Court upheld a Louisiana ordinance that greatly burdened certain types of interstate commerce. In America, there is a vast business in the solicitation of subscriptions to national magazines and periodicals. Solicitors go from town to town, from State to State, knocking on doors and obtaining subscriptions to out-of-state publications. Subscriptions obtained in that way amounted to about 50 percent of the total subscription circulation of our national magazines. Louisiana made it a crime for any solicitor to go to any home to solicit an order, unless requested or invited to do so by the owner or occupant of the premises. Since local sellers were treated the same as out-of-state sellers, there was no discrimination against interstate commerce. The Court permitted this method of doing an interstate business to be drastically impeded. The State's interest in protecting the privacy and quiet of her citizens was held by the Court to be a sufficient basis for suppression of this interstate trade. No more extreme case of a State legislating in the federal domain can probably be found in our books.

(2) *Licensing the Privilege of Doing Interstate Commerce.*—In recent decades, Congress has set up many

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regulatory schemes that require a permit from a federal agency before a particular interstate business may be conducted. Conspicuous are the certificates required of motor carriers and natural gas pipe-line companies. The power of the Congress to place those requirements on interstate commerce is clear. The lack of power of a State to exact the same or like conditions from an interstate business is equally well established.

A State may not license the transport of railroad cars across a boundary river between two States. *St. Clair County* v. *Interstate Transfer Co.*, 192 U. S. 454. It may not require a license from one engaged in the interstate express business. *Crutcher* v. *Kentucky*, 141 U. S. 47; *Adams Express Co.* v. *New York*, 232 U. S. 14.

Drummers—traveling salesmen—entering a State for the purpose of soliciting orders for out-of-state firms cannot be required to get a license or pay a tax for that privilege. *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Real Silk Mills* v. *Portland*, 268 U. S. 325; *Nippert* v. *Richmond*, 327 U. S. 416; *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389.

In absence of a contrary regulation by Congress, a carrier doing an interstate business may, however, be regulated in many ways by the State it crosses: registration of the vehicle and obtaining of a driver's license may be required (*Sprout* v. *South Bend*, 277 U. S. 163, 169); the operator can be forced to appoint an agent on whom process may be served in case an action arising out of operation of the vehicle in the State is brought (*Hess* v. *Pawloski*, 274 U. S. 352, 356); the carrier can be required to carry adequate liability insurance (*Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 365) and to observe maximum hours of work prescribed by local law for truck drivers (*Welch Co.* v. *New Hampshire*, 306 U. S. 79); vehicles that are unsafe may be barred from the highway (*Sproles* v. *Binford*, 286 U. S. 374, 389); and an interstate carrier may be denied the right to use a particular highway, because of the congestion of traffic and the re-

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quirements of safety and security (*Bradley* v. *Public Utilities Commission*, 289 U. S. 92). Moreover, a State may, in the interests of sanitation and health, require the disposition of dead animals (not slaughtered for food) at disposal plants in the State and punish the transportation of the carcasses out of the State. *Clason* v. *Indiana*, 306 U. S. 439. But the power to deny the right to do an interstate business is a power rarely allowed a State.

The State may not withhold a permit to operate a bus or a truck in interstate commerce because it deems the existing facilities adequate to handle the business. *Buck* v. *Kuykendall*, 267 U. S. 307. If interstate commerce is to be barred or prohibited or curtailed, it is the Congress that must do it. A State may not take such a drastic step, even to enforce its own laws. Thus Illinois was recently prevented from suspending the operations of interstate truckers for violation of its highway laws relative to the weight of vehicles. *Castle* v. *Hayes Freight Lines*, 348 U. S. 61. Illinois could try the truckers for their violation of those highway laws and fine them or jail them. But the Court held that Illinois could not punish them by suspending their operations. For that would be the equivalent of depriving them of their interstate licenses, which had been granted them under federal law.

The power to tax the privilege of engaging in interstate commerce, like the suspension of the right to conduct it, gives effective control over it. The power to tax the privilege has been asserted over and again by the States. And the Court has consistently denied them that authority, as *Steamship Co.* v. *Portwardens*, 6 Wall. 31, illustrates. The reason was expressed in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112, "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

At times the Court has applied that principle to an extreme. Pennsylvania required a license of a person selling steamship tickets for transportation to or from foreign countries. The law required filing of a bond, and a

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showing that the agent was of good moral character and an agent for steamship companies. The law was plainly designed to prevent fraud on the public. The Court struck down the law as a regulation of foreign commerce. *Di Santo* v. *Pennsylvania*, 273 U. S. 34. That was in 1927. By 1941 there was a new Court when *California* v. *Thompson*, 313 U. S. 109, was decided.

That case involved a California statute, which required a license for every agent selling tickets for highway travel. It was sustained against an agent who arranged for interstate transportation. The agent was not engaged in interstate transportation; therefore, said the Court, California was not seeking to license interstate traffic. The law was upheld as a method of protecting the public against fraud, "peculiarly a subject of local concern and the appropriate subject of local regulation." *Id.*, 115. The *Di Santo* case was accordingly overruled.

(3) *Discrimination Against Interstate Commerce.*— Local trade or industry often seeks protection from or preference over products that reach the local market from other States. Local interests that are powerful in the state legislatures can often get laws passed that give the desired protection or preference to the home industries. The legislators who pass those laws, the governors who approve them, and the state courts that sustain them often do not have the national interest in mind. So it is, that over the years a host of discriminatory practices against interstate commerce would have flourished, but for the vigilance of the Supreme Court, sitting in review of state regulations.

Thus, Georgia tried to make all vessels touching its ports take Georgia pilots, except vessels operating in Georgia waters, or between Georgia ports and either South Carolina or Florida. This was held invalid under the Commerce Clause as a discriminatory law. *Spraigue* v. *Thompson*, 118 U. S. 90.

Virginia had a law requiring that flour brought into the State for sale be inspected; and fees were fixed for the

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inspection. Flour manufactured locally was not required to be inspected. This law was condemned as discriminatory against interstate commerce. *Voight* v. *Wright*, 141 U. S. 62.

Florida established a similar inspection system for cement brought into Florida from a foreign nation, while establishing no inspection for cement manufactured in Florida. The Court, noting that the purpose of the law was "to keep out foreign goods," nullified this law, because it, too, contained a "calculated discrimination against foreign commerce." *Hale* v. *Bimco Trading Co.*, 306 U. S. 375.

North Carolina exacted a tax from non-resident sellers that was not required of resident retailers. A New York retail house rented a display room in a North Carolina hotel, took orders for goods, and had them shipped from New York. The tax on such a person was $250 a year, while the comparable tax on a regular retail merchant in North Carolina was $1 a year. The tax on the New York merchant was accordingly held unconstitutional under the Commerce Clause. *Best & Co.* v. *Maxwell*, 311 U. S. 454.

Some of the most striking cases illustrating the principle involve milk—a commodity so vital to the health of the community that the right to local regulation of its processing and distribution is well established. Equally beyond doubt is the principle that the Commerce Clause prohibits a State from prohibiting the movement of milk into the State or its export out of the State. But the mind of man is ingenious and has often used the first of these principles in an attempt to defeat the second.

In *Baldwin* v. *Seelig*, 294 U. S. 511, New York prohibited the sale of milk imported from Vermont, because the price paid to the producer in Vermont was below the minimum price prescribed by New York for purchases from New York producers. The law was designed to protect New York farmers from the lower Vermont prices.

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This was an economic barrier against out-of-state competition which the Court held to be unconstitutional.

The converse of this situation was presented in *Hood & Sons* v. *Du Mond*, 336 U. S. 525. Milk from New York State had long supplied Boston, Mass. The distributor, Hood, sought additional facilities in New York for its Boston market. It was denied a permit by New York, because there was a shortage of milk in some of its cities, and New York thought these additional purchases in the New York market would be destructive of local interests. The Court nullified the law, as inconsistent with the philosophy of the Commerce Clause that "our economic unit is the Nation," and that every producer or merchant has "free access to every market in the Nation."

The city of Madison, Wisconsin, enacted an ordinance forbidding the sale of pasteurized milk in the city, unless it was pasteurized and bottled at an approved pasteurization plant within five miles of the center of the city. An Illinois distributor of milk was denied a license to sell its milk in Madison, because its pasteurization plants were more than five miles away. The Court concluded that the ordinance was not a health measure because the milk of the Illinois distributor might be wholesome. It was, in the view of the Court, "an economic barrier protecting a major local industry against competition from without the State" and therefore unconstitutional under the Commerce Clause. *Dean Milk Co.* v. *Madison*, 340 U. S. 349.

Judges often disagree, as they did in the two milk cases last discussed, over what constitutes discrimination against interstate commerce. But all agree that the reserved power of the States, expressed in the Tenth Amendment, does not include the power to lay on interstate commerce a heavier hand than is laid on local commerce, or to set up barriers against interstate trade so as to prefer local merchants over non-residents. Today, one of the least controversial phases of our Commerce Clause law is that the force of the Clause creates an area of free

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trade, safe from state laws calculated to discriminate against interstate commerce.

(4) *Burdening Interstate Commerce.*—The arguments as to whether a state law placed an undue burden on interstate commerce have created sharp divisions in the Court. Every state law touching or affecting interstate commerce is in a sense a burden on it. Some are quite incidental and quite unimportant. Others have a suffocating effect, as severe as any discriminatory law. In between are laws of all shades and degrees; and they have produced a legion of cases.

As I said earlier, some Justices have maintained that the Court should not undertake to determine whether a state law burdens interstate commerce. They have argued that the role of the judiciary should be restricted to determining whether a state law and a federal law are in conflict and whether a state law discriminates against interstate commerce. The view was recently reiterated by Justice Black who said, "I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress." *Morgan* v. *Virginia*, 328 U. S. 373, 387.

That view, however, has not prevailed. The Court sits to determine how great a burden a state law places on interstate commerce. That frequently entails weighing evidence, drawing nice lines, and making close and difficult decisions on important policy questions.

The cases where a State has been allowed to place burdens on interstate commerce are too numerous to list. Thus, a State may license trainmen engaged in interstate commerce in order to insure their skill and fitness. *Smith* v. *Alabama*, 124 U. S. 465; *Nashville, C. & St. L. Ry.* v. *Alabama*, 128 U. S. 96. It may define the size of crews manning interstate trains, *Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, and prescribe regulations for payment of their wages. *Erie R. Co.* v. *Williams*,

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233 U. S. 685. It may require that guard posts be placed on bridges of an interstate railroad. *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628. It may limit the speed of interstate trains within city limits. *Erb* v. *Morasch*, 177 U. S. 584. It may require an interstate railroad to eliminate grade crossings. *Erie R. Co.* v. *Public Utility Commissioners*, 254 U. S. 394, 409, 412. It may require payment of fees for use of harbors, *Cooley* v. *Board of Wardens*, 12 How. 299; *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261. State laws have been sustained which abolish the car stove in interstate trains (*New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628), which require locomotives to be supplied with electric head lights (*Atlantic Coast Line* v. *Georgia*, 234 U. S. 280), and which make a caboose mandatory (*Terminal Railroad Assn.* v. *Brotherhood*, 318 U. S. 1). As I have already stated, a State may pass local quarantine laws applicable to merchandise moving in interstate commerce as a means of protecting public health. And it may regulate ticket brokers who sell interstate or foreign transportation, so as to safeguard the public against fraud.

A few cases illustrate the nature of the prohibited "burden" on interstate commerce. The early case of *Foster* v. *Master and Wardens*, 94 U. S. 246, invalidated a Louisiana law which required that the master and wardens of the port of New Orleans be the exclusive inspectors of the hatches of all sea-going vessels arriving at that port. The object of the law was to certify the quantity, value, and condition of the cargoes—whether imports or exports—for the protection of buyers and consumers. Louisiana was held to have no power to bar other persons from making such inspections. Louisiana's law was held to be an attempt to fasten a monopoly service on interstate and foreign commerce, which was unreasonable and oppressive.

Another type of "burden" is illustrated by *Seaboard Air Line R. Co.* v. *Blackwell*, 244 U. S. 310. There, a Georgia law requiring trains to slow down almost to a stop at each

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grade crossing was invalidated. Likewise in *Cleveland & St. L. R. Co.* v. *Illinois*, 177 U. S. 514, an Illinois law requiring interstate trains to stop at certain stations was struck down. And see *St. Louis & S. F. R. Co.* v. *Commission*, 254 U. S. 535; *St. Louis-S. F. R. Co.* v. *Commission*, 261 U. S. 369.

The crucial factor in this class of cases is the incidence of the particular law on the interstate activity or transaction. See *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 210. If the local law materially restricts the free flow of commerce across state lines, or if it interferes with the interstate activity or business in matters with respect to which uniformity of regulation is essential in the national interest, the law is unconstitutional. But how are such matters determined? What are the criteria for decision?

Many questions are fairly debatable, both as regards the reasonableness of a state law and its wisdom or propriety. If there is much to be said on both sides, the opinions of the Court say that the law must stand. The question of the "burden" on interstate commerce is "not to be determined by weighing on the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in Court appears to favor a different standard." *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. The Court in that case went on to say, "Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility." *Id.*, 191.

The proving of facts to belie the legislative judgment is sometimes an onerous undertaking in this type of litigation. Perhaps the case that best illustrates how it can be done successfully is *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761.

That case involved the question whether an Arizona law, limiting railroad trains to 14 passenger cars or 70 freight cars, was an unconstitutional burden on commerce

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when applied to interstate trains. The case was tried in the Arizona courts and produced a voluminous record of 9 large volumes containing over 4,000 pages of evidence. At the trial, there were extensive hearings lasting over five months. The record showed that:

railroads often run over 100 freight cars on a train, sometimes as many as 125 or even 160 cars;

this law would make the particular carrier which challenged the regulation haul 130 per cent more trains in Arizona than would otherwise be necessary;

the additional cost to the two railroads traversing Arizona would be about one million dollars a year;

the conversion and reconversion of train lengths at terminals delayed traffic and impeded efficient operation;

it was not feasible to convert the trains into the smaller units at the border of Arizona and then reconvert them as soon as the trains left the State, because of the absence of switching and other facilities at those points; so it was necessary to comply with the Arizona law long before the trains reached Arizona and long after they had left that State;

most States had no limitation on train length, only two having the 70 car limitations;

the breaking up of trains led to more trains in operation with more grade crossing accidents.

These were the main facts adduced in evidence against the Arizona law. In favor of the Arizona law was impressive evidence indicating that the safety of the men responsible for railroad operation was increased by restricted train lengths, especially in the winding canyons that mark so much of our western country.

A divided Court held the law invalid. After giving weight to the legislative finding, a majority of the Court nonetheless determined that the need for uniformity in interstate train regulations made it more important that

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the train lengths go unregulated than that local safety regulations be sustained.

The Court was charged with acting as a "super-legislature." *Id.*, 788. But whether that label is or is not deserved, the Court in this type of case necessarily sits in judgment on a host of complex facts and sometimes ends up in disagreement with the legislative decision.

Morgan v. *Virginia*, 328 U. S. 373, is another case where the Court, in the interest of uniformity of regulation, invalidated a local law affecting interstate carriers. Virginia required motor vehicle carriers (both interstate and intrastate) to segregate the white passengers from Negroes so that contiguous seats would not be occupied by persons of different races at the same time. Violation of the law by the carrier was a misdemeanor. The driver was charged with supervising the seating requirement.

A Negro, who was traveling interstate, violated this segregation requirement and was tried and convicted. His conviction was reversed on the ground that the Virginia law was unconstitutional.

This interstate passenger was traveling from Virginia to Maryland through the District of Columbia. There was no segregation of passengers in the District. Moreover, while a few States required segregation of passengers on buses, most States did not; and many absolutely forbade it. Passing from one type of State into another and then into still another would entail a constant shifting of seats. This necessity of reseating the interstate passengers to satisfy the diverse laws of the several States was held to be too great a burden for interstate commerce to bear. Moreover, the difficulties sometimes involved in identifying a person as white or colored made such a law difficult of reasonable application in an amicable fashion. These reasons led the Court to conclude that segregation by a State of interstate passengers on the basis of race was an unreasonable interference with commerce; that the requirements for the seating of interstate pas-

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sengers required national uniformity, not diverse, contradictory, and confusing regulations by the States.

(5) *Taxing Interstate Commerce.*—The Constitution of the United States, like the Indian Constitution, has some explicit provisions relating to taxes that the States may not impose. These are imposts or duties on imports or exports, curtailed by Article I, Section 10, which I will discuss later. I am here concerned with taxes of a different character—sales taxes, use taxes, taxes on gross receipts, and the other types of taxes laid on interstate businesses or interstate transactions by local taxing authorities.

It is obvious that an interstate industry doing business in several States gets benefits and protection from each of them. Society offers many services to such firms. Police and fire protection are the obvious ones. Highways, water and light, health centers, parks, hospitals, the maintenance of courts for the administration of justice are others. All who live in the community benefit by those services and should help pay for them. A tax on property located in the State raises no problems, assuming discrimination is not present. But frequently the question arises as to what property is within the reach of the State. Under our Constitution, a State is barred by the Fourteenth Amendment from depriving any person of property "without due process of law." And under our decisions a state tax laid on tangible property having an actual situs outside the taxing State violates due process. *Frick* v. *Pennsylvania*, 268 U. S. 473.

The doctrine of the *Frick* case is not based on the Commerce Clause. The *Frick* case defines what is beyond the jurisdiction of a State to tax by reason of the Due Process Clause of the Fourteenth Amendment. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435; *State Tax Commission* v. *Aldrich*, 316 U. S. 174. On the other hand, the Commerce Clause cases define, controversy by controversy, what taxes would place an undue burden on interstate commerce. But though the question of due process is not

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involved, it has probably conditioned much of what has been written about state taxation of interstate business.

The field is far too vast to be covered in a brief space. A few illustrations involving various types of taxes will show the main contours of the law.

First, there is the franchise tax. If a multi-state enterprise had to pay a franchise tax on its entire capital stock, surplus, and profits to each of the States in which it operated, it would be at a tremendous disadvantage compared with local industries. It would, in other words, pay taxes which in practical effect placed an extra burden on the business because it was interstate in character. Realization of that problem has led to a requirement that such taxes be apportioned.

A case involving a Texas statute illustrates one aspect of the problem. Ford Motor Company manufactures motor vehicles and parts in Michigan and has assembly plants in Texas. The parts assembled in Texas are manufactured outside that State; but most of the assembled vehicles are sold in Texas. Texas had a franchise tax that was a charge on such proportion of the outstanding stock, surplus, and undivided profits of a corporation as the gross receipts of its Texas business bore to its total gross receipts. The Court sustained the tax against a claim that it violated both the Commerce Clause and due process of law. *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331.

In *International Harvester Co.* v. *Evatt*, 329 U. S. 416, Harvester was a foreign corporation doing business in Ohio. It had factories and retail stores in Ohio and many factories and stores in other States. Goods produced in Ohio were sold both in Ohio and outside Ohio. Goods sold in Ohio were often manufactured in other States. Ohio previously had laid a tax on shares of capital stock not attributable to nor represented by a foreign corporation's assets or business in Ohio; and that tax had been declared unconstitutional by the Court, as placing an undue burden on interstate commerce. *Air-Way Corp.* v.

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Day, 266 U. S. 71. Ohio revised its law and used a different formula to determine what part of a foreign corporation's total capital stock represented its Ohio business and property. It first took half of the value of the issued capital stock and multiplied it by a fraction, the numerator of which was the value of the firm's Ohio property and the denominator of which was the value of the firm's total property. The other half was multiplied by another fraction, whose numerator was the value of the business done by the firm in Ohio and whose denominator was the total business of the company. The sum of these two products was the tax base. This formula of apportionment was upheld under both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. The tax was held to bear a just relation to the value of doing business in Ohio, even though sales of goods manufactured in Ohio but sold outside the State, and sales in Ohio of goods manufactured in other States, were counted as Ohio business.

Any method of allocating to one State its fair share of a nation-wide, unitary business is at best an approximation. Accounting is not an exact science. One accounting method may show no net income attributable to a particular branch; and yet a formula of apportionment may properly credit a portion of the profits of the total business to that branch. Such was the case in *Butler Bros.* v. *McColgan*, 315 U. S. 501, involving the Due Process Clause of the Fourteenth Amendment, not the Commerce Clause, yet still relevant to the general problem. In that case the overall profit was over one million dollars, of which some 8 per cent was allocated to California. The apportionment formula averaged the percentages which (a) value of real and tangible personal property, (b) wages, salaries, commissions, and other compensation of employees, and (c) gross sales (less returns and allowances) attributable to the California branch bore to the corresponding items of all the branches. The Court ruled that it could not be said that the formula

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was not fairly calculated to assign to California that portion of the net income reasonably attributed to that State.

A full analysis in a given case would entail an autopsy of a business year, appraising the various factors that contributed to the income. Some might be unitary and thus inseparable from the whole; others might reflect conditions purely local and hence indigenous to particular branches. Where the formula on its face seems reasonably related to business activities in a particular State, the burden is on the taxpayer to show that the diversities and character of a particular business cause the formula as applied to it to distort the values being taxed.

An *ad valorem* tax on real property owned by an interstate enterprise presents no Commerce Clause difficulties. But questions often arise when *ad valorem* taxes are levied on chattels or other personal property. Railroad cars are constantly entering and leaving the various States; yet during the taxable year a fixed proportion of the cars may be in one State. As early as 1891, the Court held it comported with the Commerce Clause for a State to tax such proportion of the capital stock of a company as the number of miles over which it ran cars in the State bore to the total number of miles over which it ran cars in all the States. *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18. That case did not involve an *ad valorem* tax; but its formula was sustained in *Ott* v. *Mississippi Barge Line*, 336 U. S. 169—decided in 1949—for the levy of such a tax by Louisiana on barges operating up and down the Mississippi River and doing business for part of that haul in Louisiana. In theory, the formula offers no chance for multiple taxation. If in fact railroad cars or barges were not in the taxing State as frequently as the formula would indicate and that fact were established, the Commerce Clause question would be in a different posture. The Court has sustained the tax only on an assumption, not rebutted, that the formula reflects an average portion of the property permanently in the State. *Id.*, 175. That is but the counterpart—and logically the necessary

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counterpart—of another ruling of the Court, that where no specific railroad cars nor any average of railroad cars was so continuously outside the home State of the corporation as to be taxable by other States, the State of the domicile could tax the entire mass. *New York Central* v. *Miller*, 202 U. S. 584. Yet where the rolling stock or vessels are regularly outside the domiciliary State, it may not put an *ad valorem* tax on them. *Standard Oil Co.* v. *Peck*, 342 U. S. 382. Once the other States can tax on an apportionment basis, multiple taxation of the interstate enterprise would result, if the State of the domicile could tax all the property. The problems of multiple taxation as applied to airlines are no different in substance from those involving barges and railroad cars, as our two leading cases, *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, and *Braniff Airways* v. *Nebraska Board*, 347 U. S. 590, illustrate.

Gross receipts taxes on interstate enterprises present comparable problems. The name a State gives to a tax is not conclusive, so far as the results under the federal Constitution are concerned. Our Court is concerned less with the name, than with the practical operation of the tax. See *Lawrence* v. *Tax Commission*, 286 U. S. 276, 280. The name "gross receipts" tax was, indeed, held to be a misnomer in *Railway Express Agency* v. *Virginia*, 347 U. S. 359; and a tax labeled "~~from~~ receipts" was stricken down as a disguised tax on the privilege of doing the interstate business. The true gross receipts tax, however, when properly apportioned, has been sustained many times in its application to interstate business.

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The cases are too numerous to analyze in detail. A few of them, however, illustrate the problem.

At one extreme is *Fargo* v. *Michigan*, 121 U. S. 230, where Michigan placed a tax on gross receipts received for transporting goods from points in Michigan to points in other States and from other States to points in Michigan. It was held to be invalid as being in part a tax on commerce carried on without the taxing State and which,

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if duplicated by other States, would lead to a multiple tax burden being placed on the interstate business.

At the other extreme is *Erie Railroad* v. *Pennsylvania*, 158 U. S. 431, where a State levied a tax on the gross receipts from the tolls collected by one railroad from other interstate carriers for use of the former's track in Pennsylvania. The tax was sustained, for it reached only commerce carried on in the State and hence was apportioned to intrastate activities.

In between those extremes are a multitude of cases, some closer to one extreme than the other, and presenting facts as complicated as the intricacies of modern business. *Western Live Stock* v. *Bureau*, 303 U. S. 250, involved a gross receipts tax on amounts received from the sale of advertising space by one engaged in publishing newspapers and magazines in the taxing State and selling them in that and in other States. The tax was sustained under the Commerce Clause, because of the distinctly local nature of the business of preparing, printing, and publishing advertising matter. Of course, the business had interstate features. But there was no tax on the interstate phase of the business and no possibility of other States repeating the tax and thus laying more than one on that phase of the business.

The same considerations saved the gross receipts tax in *Canton R. Co.* v. *Rogan*, 340 U. S. 511. There the receipts were earned from the handling of goods by a carrier and the switching of cars at a terminal, all intrastate activities. The fact that the goods were in foreign commerce and that the handling was an incident in the export-import process was therefore immaterial.

The leading decisions involving the sales and use taxes are generally of a recent vintage. They are products of the intensified search for revenue that the depression and the war years produced.

McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, sustained a New York sales tax on a contract of sale made in New York for shipment of coal from Pennsylvania to

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a New York purchaser. Delivery of the goods within the State for purposes of consumption was the local activity which the Court concluded was sufficient to sustain the tax.

Adams Mfg. Co. v. *Storen*, 304 U. S. 307, held invalid the converse tax—a sales tax levied by the State of the seller upon receipts from goods manufactured there and sold in other States. The tax was on wholly unapportioned revenues from an interstate transaction.

So far as *sales taxes* were concerned, it seemed from those two cases that the Constitution permitted taxation of the transfer of possession to the purchaser within the taxing State but not taxation of the sale by the State of the seller, if the tax were not apportioned. In this regard, Article 286 of the Indian Constitution is relevant. That Article provides, in part:

"(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

"(a) outside the state . . . .

"*Explanation.*—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

"(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce . . . ."

As I read the decisions construing that Article, particularly *Bombay* v. *United Motors Ltd.*, 16 Sup. Ct. Jour. 373, and *Himmatlal* v. *Madhya Pradesh*, 41 A. I. R. 403, both decided by the Supreme Court of India, I judge that the constitutional law of India relative to

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the sales tax draws a line close to that drawn by *Berwind-White* and *Storen* under the United States Constitution.

But the line drawn by the latter cases was soon to change.

In *McLeod* v. *Dilworth Co.*, 322 U. S. 327, Arkansas was not permitted to levy a sales tax on purchases of goods in Tennessee from Tennessee firms for consumption in Arkansas. *Berwind-White* was not overruled. It was distinguished on the ground that in that case the seller had a sales office in New York, while in the *McLeod* case the seller maintained no offices in the taxing State but obtained his orders in Arkansas from traveling salesmen, by mail, and by telephone, and filled them in Tennessee. The sales were completed, said the Court, in New York, in the *Berwind-White* case; and in Tennessee, in the *McLeod* case.

The State of the seller was further curtailed in *Freeman* v. *Hewit*, 329 U. S. 249. There Indiana laid a tax on the proceeds of securities sold by a citizen of Indiana through a broker on the New York exchange. The local activity was receipt of income in Indiana. A tax on the fees of the broker would, of course, be a tax on fees from interstate transactions. But receipt of the proceeds of the securities, after payment of the brokerage fees, was as intensely local as receipt of the proceeds of any Indiana property sold with the aid of the mails or other interstate agencies. Nevertheless, the proceeds were held not taxable by reason of the Commerce Clause.

At present, sales taxes cannot be levied by the State of the purchaser on some out-of-state purchases; and they cannot be levied by the State of the seller on either the interstate transaction or the net proceeds which the seller receives from it. Technical distinctions have taken the place of practical realities; and the power of the States has been more severely curtailed than was necessary to save interstate commerce from the burden of multiple taxation.

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Article 301 providesthat trade and commerce shall be free. Article
303 bans laws preferring one State or discriminating between States
in respects trade and commerce.

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The ground lost in the *sales tax* field has not been regained by resort to the *use tax*. A tax imposed on the user has, of course, a solid basis, provided it is not discriminatory against interstate trade, since the local use in the State of destination is the taxable event—an event that occurs after interstate commerce has ended. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167. The American constitutional law parallels at this point the Indian constitutional law, as reflected in Article 304 of the Indian Constitution and the important *dictum* of *Bombay* v. *United Motors Ltd.*, 16 Sup. Ct. Jour. 373, 379.

Article 304 provides, in part:

"Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

"(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced . . . ."

The dictum in the *Bombay* case is as follows:

"Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax, etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce. In other words, the commercial unity of India is made to give way before the State-power of imposing 'any' non-discriminatory tax on goods imported from sister States."

We have found in America that use taxes are difficult to collect against the thousands of purchasers. And so the States have endeavored to make the sellers collect use taxes for them. The major constitutional contests over the use tax have, indeed, centered on those attempts. In *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S.

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359, a chain store was operating both inside and outside Iowa. Iowa was allowed to make the chain responsible for the use tax on all purchases made at the Iowa stores and on orders placed at those stores but filled by shipments from out-of-state branches. The Court went further and required the chain to be collector for the use tax on orders placed by Iowa purchasers directly with out-of-state branches. That burden was exacted as part of the price of doing business in Iowa, there being no discrimination against interstate transactions. The same result was reached in *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, where Iowa was allowed to make the out-of-state company its tax collector, though the company was doing business in Iowa only through traveling salesmen who solicited the orders.

But the State of the purchaser was denied such power in *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340, though the seller's contacts with the taxing State were hardly less attenuated. The seller did not have traveling salesmen in the taxing State; but it advertised there by newspapers, radio, and direct mail. Moreover, it commonly made deliveries in the taxing State by truck. The effort to make the out-of-state seller collect the use tax was defeated not by the Commerce Clause, but by the Due Process Clause of the Fourteenth Amendment. The use tax collection cases are, indeed, more excursions into the field of due process than into interstate commerce. They turn basically on whether the taxing State has sufficient contacts with the seller, whether it has extended him sufficient benefits to exact from him the duty of tax collector.

(6) *Imports and Exports.*—I mentioned earlier the special provision in Article I, Section 10 of the American Constitution relative to imports and exports. It reads:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts,

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laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

The provision is somewhat analogous to Article 286 (1)(b) of the Indian Constitution, which reads:

"No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place . . . in the course of the import of the goods into, or export of the goods out of, the territory of India." *

The scope of the Import-Export Clause in the United States Constitution is not coterminous with that of the Commerce Clause. As we have seen, the latter contains no specific restrictions on the States; nor does it speak in terms of taxes. It has, however, been construed as creating an area of trade free from state interference, and yet not barring taxation which makes interstate commerce pay its way. The result has been an accommodation between competing interests: on the one hand, the need for interstate commerce to pay its fair share of the cost of local government; on the other hand, the need to avoid discrimination against interstate commerce, or a levy on the privilege of doing it, or an undue burden on it. But the Import-Export Clause contains no such qualifications. It prohibits "any" tax on imports or exports without the consent of Congress, with but the one exception of inspection fees.

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*The Supreme Court of India held in *Travancore Cochin* v. *Bombay Co.*, 15 Sup. Ct. Jour. 527, that sales and purchases which occasion the export or import of goods out of or into India come within the scope of Article 286 (1)(b).

In *Travancore Cochin* v. *Vilas Factory*, 16 Sup. Ct. Jour. 471, the Court held that purchases "in the State by the exporter for the purpose of export as well as sales in the State by the importer after the goods have crossed the customs frontier are not within the exemption" of 286 (1)(b), but sales "in the State by the exporter or importer by transfer of shipping documents while the goods are beyond the customs frontier are within the exemption." *Id.*, 478.

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Article 304 of the Indian Constitution allows the legislature of a State to "impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced." But there is no such qualification or exception in the Import-Export Clause of the United States Constitution. None is expressed; nor has any been implied. And so the fact that a tax is not discriminatory and would not be a "burden" on commerce under the Commerce Clause tests does not save it under the Import-Export Clause. If the tax is on an import or export, it is unconstitutional save for the narrow exception stated in the Import-Export Clause.

The major contests in this area have been waged over when export has started and when import has ended.

The United States Supreme Court first considered that problem in 1827 in *Brown* v. *Maryland*, 12 Wheat. 419. It was there held that a State could not require importers of foreign goods to take out a license and pay a fee for conducting their business. That case created the "original package" doctrine—a conception not entirely congenial to Indian constitutional law as *Travancore Cochin* v. ~~S. V. C.~~ *Factory*, 16 Sup. Ct. Jour. 471, 477, makes clear. The "original package" doctrine dilutes the taxing powers of the importing States by requiring them to withhold any tax on the imported goods, until they have "become incorporated and mixed up with the mass of property" in the State. The fear was that unless strong sanctions were given the Import-Export Clause, the seaboard States would place unequal taxation on imports at the expense of the States in the interior. The aim was to get uniformity of import duties by leaving the entire matter to Congress.

Brown v. *Maryland* held that the constitutional immunity of imported goods survives arrival in the country and persists at least until the goods are sold in their original packages. Resales are not, however, within the

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immunity. *Waring* v. *Mayor*, 8 Wall. 110. But *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, decided in 1945, went further and held that the immunity survives even where the importer holds the goods for his own use—in that case bales of hemp brought in from the Pacific for the manufacture by the importer into cordage.

The export has started once delivery has been made to a common carrier for export. *Spalding & Bros.* v. *Edwards*, 262 U. S. 66. But such delivery is not a *sine qua non*. Other circumstances may show the same degree of certainty that the goods are headed overseas. That is true of oil, once it is pumped into the hold of a vessel furnished by the foreign purchaser for shipment abroad. *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69. But a purpose and plan to export the commodities are not enough. The goods must have entered the export stream before immunity attaches. And so a partially dismantled plant that has been sold to a foreign purchaser, who ~~planned~~ to take it overseas, is taxable by a State until the materials are actually committed to that destination. The fact that title has passed and possession has been taken for the purchaser is not sufficient. *Empresa S. S. A.* v. *County of Merced*, 337 U. S. 154.

C. *Summary.*

In America there have been no more important problems in federalism than those arising under the Commerce Clause. The late Justice Rutledge wrote in 1946, "From the disunited states of 1786, which interstate trade barriers had created, has grown the United States of 1946. No small part of that growth has been due to the effects of the Commerce Clause and its administration. Perhaps no other constitutional provision has played a greater part." *A Declaration of Legal Faith*, 72–73.

Our Congress has done much to keep the system in balance. The Court, too, has played a significant role. The early entrance of the judiciary into the field set a precedent that has been followed ever since. The courts

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have been active agencies in removing barriers that might, through gradual accretion, have either paralyzed the whole flow of commerce or produced a degree of Balkanization which would have altered the unitary character of the United States. Congress, of course, could have removed those barriers and probably would have done so. But the judiciary has, perhaps, moved with greater speed. As a result of the case by case approach, there has been no great lag between the creation of the forbidden barrier or burden and its removal by the judiciary.

The principles which govern in this field are simple to state but difficult to apply. Their application produces a great contrariety of opinion. Most of the major decisions have been by a divided Court. The fact that there is a five-to-four decision usually means that there is at hand a five-to-four problem. Judges are not perverse; they look for unanimity, not disagreement. And yet the issues are usually so closely drawn in this part of the commerce field that differences are more common than agreement.

The reason is obvious. The competition is between the requirements of free trade on the one hand and the public welfare and the need for local revenue on the other. Interstate commerce should not be immune from all regulation and from all revenue measures imposed by local authorities. Interstate trade benefits as much from local laws as local trade, and should share with local trade the burdens and costs of it. No syllogism can supply the answer as to how much is a fair share. These problems, like most problems in law, are not solved by logic. Their answers rest on an appraisal of practical considerations, on the likelihood of injury or prejudice to the interstate mechanism, if it is saddled with a particular regulation. The problems involve large policy questions, in the solution of which the judiciary is heavily implicated. Judges must be more than lawyers; they must be statesmen as well. For it is their vision that determines how commercially united America—or India—will be.

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The cases often bring imponderables into play. ~~It may well be that the~~ predilections of a judge influence particular decisions. The balance may be so evenly cast that the result may turn on whether at heart the judge is more of a federalist than a states' righter, or *vice versa*. Constitutions can say that commerce must be free; but over the years the courts will be largely the ones who will implement these provisions. That at least has been the American experience. And the performance of the judiciary in that regard has, on the whole, ~~given us~~ a highly commendable record. A national area of free trade has flourished; yet interstate commerce has been required to pay its way; it has not become either a lawless element of our society or so sacrosanct as to be immune from local regulation and control.

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TAGORE LECTURES

VIII

The Reach of Due Process

The problem of man in the field of political science has been not merely the establishment of a government, but also the protection of the people against the government which was established. The problem is not peculiar to any people nor to any continent. It is universal, for people are people whatever their race or color. Power is a heady thing no matter who holds it; those in power need checks and restraints lest they come to identify the common good with their own tastes and desires, and their continuation in office as essential to the preservation of the nation. As Oliver Cromwell said in 1654, "Of what assurance is a *Law* . . . if it lie in the same Legislature to *un*law it again? Is such a law like to be lasting? It will be a rope of sand; will give no security; for the same men may unbuild what they have built."

The system of checks and balances, discussed in an earlier Lecture, serves a high purpose in diluting the power of each branch of government, making it subject to ~~inspection and inquiry~~ by the other branches. A strong, independent judiciary is a part of the guarantee which a free people need, lest the executive and legislative branches become a law unto themselves.

When the American Colonies were under Britain, they had felt the burden of oppressive laws passed by a Parliament in distant London. The taxes they bore were in

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part levied from abroad and used to finance the cost of keeping control over the unruly Colonists. Parliament had authorized troops to be quartered among them. Through actions of the royal government the people had lost their right to assemble and to petition the government. Each of the Colonies later had a state government; and the people had seen four of those governments deprive citizens of their right to jury trial in civil cases. The people had seen their legislatures pass bills of attainder, sentencing men to death or banishment, without a trial by jury. They had seen legislatures allow worthless paper money to be used as legal tender to pay honest debts. They had seen legislators vote to impose a discriminatory tax on a free press.

The American Colonists had also experienced the lash of subservient judges, who did the bidding of the Crown in crucial matters, including the use of unconscionable search warrants. There were exceptions; for the American judiciary was not immune from the contagious influence of the spirit of independence sweeping the American Colonies. There were also exceptions among the legislatures. The local bodies, representing the people, often stood adamant against the demands of the British Parliament or the Royal Governors.

But when the separation from Britain had been completed, memories of executive, legislative, and judicial despotism were still fresh. Hence, one of the first things the Colonies did after they declared their independence was to assure the people of a Bill of Rights. One, drafted by George Mason, was adopted by Virginia on June 12, 1776, a few weeks before the American Declaration of Independence. Other States followed suit, for the desire to protect human rights against the despotism of legislatures and courts was deep and demanding. This first American Bill of Rights is so important in American history that I have included it as Appendix I. Then Bills of Rights safeguarded the people against their state governments, which were central in the scheme

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of things at the time the Constitution was being drafted. The need for a federal government was emphasized by military, fiscal, and economic matters. The idea of a Bill of Rights to control the national government that was being created did not enter much into the deliberations. Yet, when the proposed National Constitution was published, the absence of a Bill of Rights applicable to the new federal government was noted as its main defect. At once, the demand for a national Bill of Rights arose from the towns and rural sections alike, perhaps more from the latter than from the former. In any event, all shades of opinion demanded a Bill of Rights to curb the new government about to be created. Thomas Jefferson expressed the sentiment when he wrote, "a Bill of Rights is what the people are entitled to against every government on earth, general or particular."

It seemed for a while that the Constitution might not be adopted, because of the absence of a Bill of Rights. Some States—Massachusetts and Virginia—refused to ratify, until they had been given assurances that a Bill of Rights would be adopted.

Consequently, as soon as the First Congress met, Amendments to the Constitution embodying a Bill of Rights were introduced. The main architect was James Madison of Virginia. The provisions of the Bill of Rights which Madison drew were not new, for he borrowed freely from the existing constitutions of the several States. Not all of the rights that were incorporated in the new Bill of Rights were in any one state constitution. At least four rights, however, were guaranteed by each State: freedom of religion, freedom of the press, trial by jury, and the guaranty against being deprived of life, liberty, or property without due process of law. Some of these rights traced to roots deep in English history. Others—such as the protection against unreasonable searches and seizures—were creations of the American experience. For the Colonists had been plagued with the invidious writs of assistance—the general search warrants

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that were good for all places at any time of day or night, the ones that James Otis inveighed against as destroying the inviolate character of a man's home.

One of the most important rights—the right of free speech—was not contained in any of the state constitutions. The right to speak freely on the floor of the legislature, without being held to account to any court, was, of course, recognized by the state constitutions. This right had derived from the great Parliamentary struggle that had gone on in England in the sixteenth and seventeenth centuries over the prerogatives of members of Parliament. The right of freedom of speech in Parliament, defended by Peter Wentworth, John Elliot, and other unsung heroes, and finally engrossed in the English Bill of Rights of 1689, was firmly established in America by the time the Constitution was adopted. But free speech in general was not held in such high estate. No state constitution guaranteed it. Thomas Jefferson and James Madison, however, were its ~~great~~ protagonists; and their promotion of the guaranty ~~gave the Amendments a new cast.~~ As Charles Warren, *Congress, The Constitution and the Supreme Court* (1930), 84, has said, "The right to freedom of speech, in general, as a new and separate guaranty, was *created* by the First Amendment to the Federal Constitution . . . ."

I will return later on to an analysis of the separate provisions of the Bill of Rights. Suffice it here to note that some of the guarantees were ancient, some new. All were deemed essential as a curb *first*, on the powers of government, and *second*, as a curb on the power of the majority over the minority. "Every man, by nature, has the seeds of tyranny deeply implanted within him," said an early memorial of the Town of Pittsfield, Mass., whose people insisted on a Bill of Rights for the Constitution. Later, James Madison wrote, "In all cases where a majority are united by common interest or passion, the rights of the minority are in danger. What motives are to restrain them? A prudent regard to the maxim that honesty is

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the best policy is found by experience to be as little regarded by bodies of men as by individuals. Respect for character is always diminished in proportion to the number among whom the blame or praise is to be divided. Conscience, the only remaining tie is known to be inadequate in individuals: In large numbers, little is to be expected from it. Besides, Religion itself may become a motive to persecution & oppression.—These observations are verified by the Histories of every Country antient & modern." I Farrand, *The Records of the Federal Convention*, 135.

He pointed out that one of the principal objects in setting up a national government was "the necessity, of providing more effectually for the security of private rights, and the steady dispensation of Justice."

The desire to have a Constitution and a Bill of Rights was a desire to put certain rights beyond the immediate reach of government. Constitutions can, of course, be amended. But the amending process is usually slow enough to give passions time to cool and reason time to take counsel. It well may be that guarantees which must be written are less secure than those so embedded in the hearts of men that they need not be written. Certainly Britain has for Englishmen a constitution which, though not written, is as enduring as human institutions can be. And Australia, though without a Bill of Rights, practices and preaches a lively democratic creed that is respectful of the rights of man. But in the perspective of history, written constitutions often serve a high function. That may well have been India's case. Certainly it was America's. A written constitution was part of the necessary process of the fusion of the American Colonies into one. A Bill of Rights was the necessary addendum to allay the fears and suspicions of those who, having known the tyranny of government, suspected that the new one they had created might fall into habits as vicious as those of all that had preceded.

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~~Not a single member of the First Congress voted against the Bill of Rights. It~~ was described by Madison as a bulwark against the Legislature and the Executive, a bulwark to be defended by the Judiciary. Speaking of these proposed Amendments, Madison told his colleagues, "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." *1 Annals of Congress* 439, First Congress, 1st Session, June 8, 1789.

On September 25, 1789, Congress proposed the Bill of Rights. On December 15, 1791, it became a part of the Constitution, when Virginia, by voting in the affirmative, brought the number of ratifying States to the necessary three-fourths. The text of these first ~~ten~~ eight Amendments to the Constitution is so important to this discussion that I have printed them as Appendix II.*

A reading of these Amendments shows they were designed to curb all branches of government—the Legislative, Executive, and Judicial. The First Amendment lays a prohibition on Congress *in haec verba*. But the despotism of legislatures was not the only fear of the proponents of the Bill of Rights. As Justice Black wrote in *Adamson* v. *California*, 332 U. S. 46, 70, "The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases." The manner in

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*The Indian Constitution contains a recital of Fundamental Rights which I have included as Appendix IV to this Lecture. These Fundamental Rights cover much but not all of the ground of our own Bill of Rights. They also include other guarantees, some of which are analogous to those contained in the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments to the American Constitution.

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which the Bill of Rights has been employed in restraint of the Judiciary as well as the Legislative and Executive will be developed later.

It was plain that great and important as was the Bill of Rights, it was limited to placing restraints on the Federal Government, not on the States. The Bill of Rights was no deterrent to state action repressive of civil rights. So far as the Bill of Rights was concerned, the States could favor one religion over another, subsidize a church, limit freedom of speech, license the press, authorize unlimited search warrants, abolish the jury system, and conduct their criminal trials in any manner they saw fit. The Bill of Rights limited federal, not state, officials. The ~~Bill of Rights~~ strengthened, ~~if anything,~~ states' rights by making explicit ~~in the Tenth Amendment~~ that powers not delegated to the Federal Government are reserved to the States or the people.

Today, the Bill of Rights acts as a restraint on certain conduct of the States. The manner in which it has come to have that effect is a significant chapter in American constitutional history that followed the Civil War.

A. *The Civil War Amendments.*

That war, under Lincoln, had as its main objective the maintenance of the Union against the actions of a rebellious minority of the States. The war Lincoln led was won; and the Union was saved. The slavery issue had ignited the conflict; and that issue continued to have repercussions long after hostilities ended. It was responsible for the addition of three Amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth, which I have added as Appendix III to this Lecture. The Thirteenth Amendment, which abolished slavery, was ratified December 18, 1865. The Fourteenth Amendment, which enlarged the class of citizens and protected the newly emancipated Negroes against certain action of the States, was ratified July 28, 1868. And the Fifteenth Amendment, which protected the rights of the Negroes

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to vote, became part of the Constitution on March 30, 1870. Each of these Amendments vitally concerned the civil liberties of the people. They not only conferred political rights on the emancipated slaves. They also placed other new restraints on state action. For present purposes, the crucial provision is in Section I of the Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is apparent at once that the prohibition is limited to action by the States.* "No State shall" are the words used. We will see later how important that limitation is. Voluntary groups of citizens acting on their own and not under the sponsorship of a State are not barred from discriminatory conduct. The individual businessman, the individual property owner, the individual student—these are all free to harbor and practice such discriminations as they may choose, absent of course some law of a State outlawing discrimination.** It is only when citizens obtain the aid of a State in furthering their discriminatory practices that the Fourteenth Amendment is brought into play. It is only when a State acts to promote, to protect, to encourage the outlawed action that the guarantee of the Fourteenth Amendment oper-

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*The Supreme Court of India held in *Shamdasani* v. *Central Bank*, 15 Sup. Ct. Jour. 29, that the rights protected by Article 19 (1) (f) and by Article 31 (1) of the Constitution (see Appendix IV to this Lecture) are rights protected against state action, not private action.

**In *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, the Court upheld a New York law forbidding any labor organization to deny any person membership by reason of his race, color, or creed. In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, the Court sustained a prosecution under a Michigan law making it unlawful to deny passage to a person on a public conveyance on account of race.

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ates. A State acts through various agents—sheriffs, posses, prosecutors, administrators, legislators, judges, governors and a host of other officials. Whatever the agency may be, the Fourteenth Amendment comes into operation, provided the agency acts for a State and does its bidding or effectuates its policy. See *Shelley* v. *Kraemer*, 334 U. S. 1. Cases to be discussed later in the Lecture series will illustrate both the reach and the limitations of the concept of state action included in the Fourteenth Amendment.

Prior to these Amendments the Constitution placed few restraints on state action. As previously noted, Article I, Section 10 barred the States from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contract or granting any title of nobility, and from doing certain other acts touching on international and fiscal affairs of the Nation. But apart from those few restraints, the Constitution had not undertaken to place beyond the reach of state action any civil rights of the citizens.

B. *Due Process and the Bill of Rights.*

I stated earlier that the Bill of Rights placed restraints on the Federal Government, not on the state governments. That was the holding in the early case of *Barron* v. *Baltimore*, 7 Pet. 243.

In that case, it was contended that the provision of the Fifth Amendment which prohibits the taking of private property for public use without just compensation operated as a restraint on the States as well as on the Federal Government. Chief Justice Marshall, speaking for the Court, stated:

"The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as

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its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes." *Id.*, 247.

There is persuasive evidence that when Congress wrote the Due Process Clause into the Fourteenth Amendment, the plan was to make the Bill of Rights applicable to the States.* Justice Black has reviewed that history in his dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68.** This is not the place to relate that history. Certainly it is true that those who wrote the Due Process Clause into the Fourteenth Amendment were not writing on a clean slate. They were using a phrase pregnant with meaning. Due process was both a substantive concept and a procedural concept. It meant that there were some things government could not do to man. It also meant that if government proceeded against a citizen, it had to proceed in a fair manner, avoiding certain indignities and certain unfair procedures. Illustrative of the former was freedom of conscience and religion. Illustrative of the latter were the right to counsel and to trial by jury.

History and experience had hammered out remedies for and safeguards against certain abuses; and they had been

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*It should be noted that since the Indian Constitution has a single system of rights, applicable to state and union governments, it has achieved, by express provision, the result urged by the *Adamson* dissenters.

**For a contrary interpretation, see: Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stanford L. Rev. 5.

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written into the law of the land. They were reflected in the Bill of Rights, a list of guaranties that was good for all times and seasons, for peace and war, for all political regimes. Why should not the Bill of Rights be taken as the definition of that due process which was guaranteed by the Fourteenth Amendment? State and Nation would then be governed by the same code, when it came to civil rights. Due process would then have a rather specific and uniform meaning, drawn from the Constitution itself and not fashioned by judges to suit their own tastes.

An alternative was to take the primary meaning of Due Process from the Bill of Rights, allowing it to be added to as new experiences showed new grievances and the need for protection against an exploitive government.

If these alternatives were rejected, then Due Process as used in the Fourteenth Amendment was wholly undefined. It would have such meaning as judges from time to time might give it. That had the advantage of great flexibility. But it also had inherent dangers. For Due Process, like Natural Law, could come to reflect the individual idiosyncrasies of the judge, his predilections, his favored economic creed or philosophical theory. The absence of guides or standards might allow judicial whim. or caprice to play havoc with legislative programs.

Though I have always thought that the Fourteenth Amendment made the Bill of Rights applicable to the States, ~~I grant that~~ a case can be made out against inclusion of the Bill of Rights in the Due Process Clause of the Fourteenth Amendment. ~~It was often argued that there was intrinsic evidence, indicating that course was never intended.~~ The Fifth Amendment, like the Fourteenth Amendment, banned the deprivation of a person's "life, liberty, or property without due process of law." That clause must, therefore, mean less in the Fifth Amendment than it does in the Fourteenth, if in the latter it is given a scope so broad as to include all of the Bill of Rights. Moreover, some provisions of the Bill of Rights seemed to reflect petty preferences, not basic principles, as for

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example the right to jury trial in cases where the value in controversy exceeds twenty dollars. Experience convinced some that trial by judge might be preferred over trial by jury, at least in civil cases. The Fifth Amendment provides for presentment or indictment by grand jury in capital or other infamous cases. Some States had evolved a different practice, allowing prosecutions to be initiated on the information of the prosecutor. Students of criminal procedure often balked at the idea of requiring state prosecutions to be initiated by the grand jury route.

And so the arguments were marshalled *pro* and *con* on the inclusion of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. To date the Court has never accepted the view that all of the guarantees of the Bill of Rights are applicable to the States as a result of the Fourteenth Amendment. Instead, the Court has proceeded on a selective basis and has included or excluded those guarantees in light of its conception of "a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325.

In *Hurtado* v. *California*, 110 U. S. 516, the Court held that use of an information in place of the grand jury indictment required in federal criminal cases by the Fifth Amendment was not a violation of Due Process when employed in state prosecutions.

Maxwell v. *Dow*, 176 U. S. 581, involved a challenge to the Utah system, whereby a criminal trial was conducted before a jury of eight members rather than the traditional twelve. The Court conceded that such a procedure in a federal court would violate the right to trial by jury contained in the Sixth Amendment. The Court held, however, that trial by a jury of twelve was not a necessary element of Due Process, at least in non-capital cases.

In *Twining* v. *New Jersey*, 211 U. S. 78, the trial court had commented on the failure of the accused to testify, and had permitted the jury to draw an unfavorable inference from this fact. This was said to violate the accused's

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privilege against self-incrimination guaranteed by the Fifth Amendment. The question to be decided was phrased as follows by the Court: "Is it [the privilege against self-incrimination] a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?" *Id.*, 106. The Court answered this question in the negative, holding that the privilege against self-incrimination, secured against federal action by the Fifth Amendment, was not secured against state action by the Due Process Clause of the Fourteenth Amendment.*

Substantial segments of the Bill of Rights, however, have been held to be included in the concept of Due Process as used in the Fourteenth Amendment. One such guarantee is the provision of the Fifth Amendment that private property shall not be taken for public use without just compensation. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, held that that guarantee is applicable to the States, as well as to the Federal Government.

In *Gitlow* v. *New York*, 268 U. S. 652, decided in 1925, the Court assumed, for purposes of the case before it, that freedom of speech and of the press were among the fundamental rights protected by the Due Process Clause from impairment by the States. The Court held, however, that even if applicable, those guarantees had not been violated in the case at bar.

A similar result was reached in *Whitney* v. *California*, 274 U. S. 357, decided in 1927. There the Court held that the California Criminal Syndicalism Act, which prohibited organization and membership in any group which advocated criminal syndicalism, was not a restraint on the rights of free speech and assembly and not repugnant to the Due Process Clause of the Fourteenth Amendment.

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*It has never been, however, held that self-incrimination may not, in some instances, be contrary to Due Process. See *Adamson* v. *California*, 332 U. S. 46, 54.

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In *Fiske* v. *Kansas*, 274 U. S. 380, decided in the same year as the *Whitney* case, the Court was confronted with a criminal syndicalism act of the State of Kansas. The Act had been applied to sustain a conviction without any charge or evidence that the organization in which the defendant secured members advocated any crime, violence, or other unlawful methods of effecting industrial or political change, and was therefore held invalid. The language of the Court was as follows: "Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." *Id.*, 387.

Thus, by 1931 Chief Justice Hughes, speaking for the Court in *Stromberg* v. *California*, 283 U. S. 359, could declare: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." *Id.*, 368. In support of this proposition, he cited the *Gitlow*, *Whitney*, and *Fiske* cases to which I have referred. The *Stromberg* case involved a California statute which forbade the displaying of any flag, badge, or banner as a sign, symbol or emblem of opposition to organized government. The state court had recognized the ambiguity of that prohibition, which might be construed to include peaceful and orderly opposition to a government by a political party out of power, including opposition by legal means and within constitutional limitations. The Court concluded: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Id.*, 369.

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In the leading case of *Near* v. *Minnesota*, 283 U. S. 697, the Due Process Clause was used to strike down an attempt at prior restraint of a newspaper, under a state statute which permitted suppression of a newspaper or periodical as a public nuisance. The Court stated: "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Id.*, 707.

Incorporation of the First Amendment has not been limited to the guarantees of free speech and a free press, but extends to all of the basic freedoms secured by that Amendment.

Thus, in *DeJonge* v. *Oregon*, 299 U. S. 353, the Court struck down a criminal syndicalism law of the State of Oregon, under which a defendant had been convicted solely because he had assisted in the conduct of a public meeting held under the auspices of the Communist Party. The Court held that this violated freedom of assembly. The inclusion of this guarantee in the Due Process concept was explained as follows: "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Id.*, 364.*

The guarantee of religious freedom and the prohibition against establishment of religion, contained in the First

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*Article 19 (1)(c) of the Indian Constitution provides: "All citizens shall have the right . . . to form associations or unions." Article 19 (4) grants the legislature power to make "reasonable restrictions on the exercise" of that right "in the interests of public order or morality." *Madras* v. *Row*, 15 Sup. Ct. Jour. 253, shows the meticulous care with which the Supreme Court of India seeks to sustain unimpaired the right guaranteed by Article 19 (1)(c). Cf. *Communications Assn.* v. *Douds*, 339 U. S. 382; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123.

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Amendment, are also included within the Due Process concept, as *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Everson* v. *Board of Education*, 330 U. S. 1, make clear.

In the *Murdock* case, an attempt to impose a license fee on members of the Jehovah's Witnesses religious sect engaged in distributing religious literature was held invalid as a restraint on religious freedom.

In *Everson*, the Court declared that the "First Amendment, as made applicable to the states by the Fourteenth . . . commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .'" 330 U. S. 1, 8.

Other safeguards included in the first eight amendments to the Federal Constitution have been held applicable to the States through the development of the "concept of ordered liberty."

A leading case in the development of that concept was *Powell* v. *Alabama*, 287 U. S. 45. In that case, certain Negroes had been convicted of rape and sentenced to death without being afforded effective assistance of counsel. The Court was presented with a claim that Due Process embraced the right to counsel. In determining this question, the Court considered the fact that at least twelve of the thirteen colonies had recognized the right to counsel in criminal prosecutions, though in one or two instances it was limited to the more serious offenses. The Court pointed out the importance of counsel in assuring the accused a fair hearing, and concluded: ". . . in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise

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would be to ignore the fundamental postulate . . . 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Id.*, 71–72.

The Court, however, has refused to hold that the requirements of Due Process are coterminous with that of the Sixth Amendment. This view was stated as follows in *Betts* v. *Brady*, 316 U. S. 455: ". . . the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.*, 473.

I shall defer a full discussion of the right to counsel to a subsequent Lecture. Suffice it to say at present that the right is applicable to proceedings in the courts of the States in the more serious criminal prosecutions. See *Massey* v. *Moore*, 348 U. S. 105.

Considerable litigation has centered about the problem of self-incrimination. In *Adamson* v. *California*, 332 U. S. 46, the Court reaffirmed the views of *Twining* v. *New Jersey*, 211 U. S. 78, to which I referred earlier, in holding that the Fifth Amendment's guarantee against self-incrimination was not made applicable to the States by the Due Process Clause. The *Adamson* case involved a state law which permitted comment upon and inferences from the failure of the accused to testify. The Court held that this procedure did not violate Due Process.

Where, however, the process of self-incrimination is carried to the point of resorting to coerced confessions, the Court has held the Due Process guarantee to be violated. *Brown* v. *Mississippi*, 297 U. S. 278, involved convictions obtained by the use of confessions procured by extreme

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physical torture, including whipping and hanging. The State contended that this was merely an instance of self-incrimination which was not prohibited to the States by the Due Process Clause. The Court answered this contention as follows: ". . . the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. . . . The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.*, 285–286.

A leading case is *Chambers* v. *Florida*, 309 U. S. 227, where convictions of murder had been obtained by the use of coerced confessions, obtained as a result of protracted questioning "under circumstances calculated to break the strongest nerves and the stoutest resistance." *Id.*, 238–239. The Court, speaking through Justice Black, held that such inquisitorial methods were one of the evils which the Due Process Clause was clearly designed to prevent.

A related problem was presented in *Rochin* v. *California*, 342 U. S. 165. In that case, state officers entered the home of a suspected narcotics offender; the latter thereupon put certain capsules in his mouth. After an unsuccessful attempt to extract them by force, an emetic was forced into the stomach of the suspect and he vomited up the capsules, which contained narcotics. The cap-

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sules were admitted into evidence over his objections; and that was held to constitute a violation of Due Process.

Further illustrations of the relation of the Bill of Rights to the Due Process Clause are furnished by *Francis* v. *Resweber*, 329 U. S. 459, and *In re Oliver*, 333 U. S. 257.

In the former case, the petitioner had been convicted of murder and sentenced to death in the electric chair. The executioner threw the switch, but, presumably because of some mechanical difficulty, death did not result. The defendant claimed that further efforts to electrocute him would violate the prohibition of the Eighth Amendment against cruel and unusual punishment. The Court held that, assuming this prohibition to be included within the scope of Due Process, it had not been violated by the facts presented in that case.

In re Oliver involved a conviction for contempt of court which had been obtained in the course of secret grand jury proceedings. The Court pointed out that, while secrecy was customary in the conduct of the investigative function of the grand jury, it was a far different matter to use such procedure in a trial arising out of those proceedings. The Court stated: "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison." *Id.*, 273.

While the concept of ordered liberty has provided a basis for securing some measure of protection against state action, that concept has not proven sufficient to embrace several of the important guarantees of the Bill of Rights. *Palko* v. *Connecticut*, 302 U. S. 319, involved a Connecticut statute which permitted appeals by the State in criminal cases upon questions of law which could, if successful, lead to a new trial. It was argued that this violated the

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Fifth Amendment's prohibition of double jeopardy, made applicable to the States by the Due Process Clause. The Court held that, assuming this guarantee of the Fifth Amendment had been violated, there was still no denial of Due Process. Justice Cardozo, speaking for the Court, stated: "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? . . . The answer surely must be 'no.'" *Id.*, 328.

In *Brock* v. *North Carolina*, 344 U. S. 424, the trial judge declared a mistrial after two of the State's witnesses refused to testify, pending the outcome of their own cases. Later, when the cases of the witnesses had been disposed of and they were available once more, a new trial of the defendant was held and he was convicted. He claimed this form of double jeopardy violated the Due Process Clause of the Fourteenth Amendment. But his claim was rejected by a majority of the Court, which held that the test laid down in *Palko* was satisfied, since the procedure did not violate the essence of a scheme of ordered justice.* Cf. *Singh* v. *Punjab*, 16 Sup. Ct. Jour. 85.

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*Article 20 (2) of the Indian Constitution provides: "No person shall be prosecuted and punished for the same offence more than once." The Supreme Court in *Hussain* v. *Bombay*, 16 Sup. Ct. Jour. 456, held that this Article had its roots in the principle of "autrefois convict" or "double jeopardy." The Court said:

"The words 'before a Court of law or judicial tribunal' are not to be found in Article 20 (2). But if regard be had to the whole background indicated above it is clear that in order that the protection of Article 20 (2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a Court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by

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In *Weeks* v. *United States*, 232 U. S. 383, the Court had held that the provisions in the Fourth Amendment restricting search and seizure barred the use of evidence secured through illegal searches and seizures in prosecutions in *federal* courts. In *Wolf* v. *Colorado*, 338 U. S. 25, a closely divided Court refused to apply a similar rule to actions in *state* courts. It was conceded that security against arbitrary intrusion by the police is implicit in "the concept of ordered liberty" as embodied in the Due Process Clause, so that were a State affirmatively to sanction such action it would run counter to the guaranty of the Fourteenth Amendment. It was held, however, that Due Process does not forbid the admission of evidence obtained by an unlawful search and seizure. Therefore, the effective sanction which the *Weeks* doctrine imposes as a means of discouraging such unlawful searches and

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a statute but not required to proceed on legal evidence given on oath." *Id.*, 460–461.

In this case confiscation of gold illegally imported was held not to bar subsequent prosecution of the importer for the offense.

The protection afforded by Article 20 (2) seems to be narrower than that embraced in the guarantee against double jeopardy contained in the United States Constitution. The Indian Supreme Court said in *Venkataraman* v. *Union of India*, 41 A. I. R. 375:

"In order to enable a citizen to invoke the protection of clause (2) of Article 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words 'prosecuted and punished' are to be taken not distributively so as to mean prosecuted 'or' punished. Both the factors must co-exist in order that the operation of the clause may be attracted. The position is . . . different under the American Constitution. There the prohibition is not against a second punishment but against the peril in which a person may be placed by reason of a valid indictment being presented against him, before a competent court, followed by proper arraignment and plea and a lawful impanelling of the jury. It is not necessary to have a verdict at all." *Id.*, 377.

In *Kalawati* v. H. P., 16 Sup. Ct. Jour. 144, the Supreme Court of India rejected a claim that this provision bars an appeal from an acquittal.

Himachal Pradesh,

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seizures is not available in state court prosecutions, so far as the provisions of the Federal Constitution are concerned.

Those guarantees that are protected against both state action and federal action are in a preferred position under our constitutional scheme. These include substantive rights:

freedom of speech
freedom of the press
freedom of religion
freedom of assembly and
compensation for property taken.

They include also some procedural safeguards:

the right to counsel in the more serious criminal cases
the right to be free from coerced confessions
the right to a public trial.

Other basic rights may be added in the days ahead. What is included or excluded depends much on the attitude of the individual Justices. Justice Holmes once stated in popular terms that an act violates due process "if it makes you vomit." He expressed the revulsion all of us feel at some actions of prosecutors, the police, and legislators. Due Process means as much as Holmes said—and more. It does not yet embrace all the guarantees of the Bill of Rights. It may never acquire that scope. But its expansion in the last twenty years to include all the First Amendment rights indicates the evolution it is undergoing and the prospects of its continuous growth and expansion as an instrument protective of the fundamental rights of man.

C. *Due Process and Social Legislation.*

As we have seen, the Due Process Clause of the Fourteenth Amendment was narrowly construed for a long time so as not to make the Bill of Rights binding on the States. But in another sense the Due Process Clause

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was rather broadly and liberally interpreted to place a heavy restraining hand on state legislatures. It seemed for a while that the Due Process Clause had given the Supreme Court powers comparable to a super-legislature. For the Court had so construed Due Process in a substantive sense as to curtail drastically the power of the States to legislate.*

Santa Clara Co. v. *Southern Pacific R. Co.*, 118 U. S. 394, decided in 1886, was one starting point for development of that doctrine. The question in the case was whether a corporation was a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Earlier decisions had rejected the argument as being without substance. In *Insurance Co.* v. *New Orleans*, 1 Woods 85, Circuit Judge Woods answered the contention as follows:

"The word *person* occurs three times in the first section, in the following connections: 'All *persons* born or naturalized in the United States'—'nor shall any state deprive any *person* of life, liberty or property,' etc.—'nor' shall

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*During the course of the debates on the Indian Constitution there were discussions on the merits of including a Due Process Clause. Thus, Pandit Thakur Dass Bhargava favored it; "This is only victory for the judiciary over the autocracy of the legislature. In fact we want two bulwarks for our liberties. One is the Legislature and the other is the judiciary. But even if the legislature is carried away by party spirit and is sometimes panicky the judiciary will save us from the tyranny of the legislature and the executive.

"In a democracy, the courts are the ultimate refuge of the citizens for the vindication of their rights and liberties. I want the judiciary to be exalted to its right position of palladium of justice and the people to be secure in their rights and liberties under its protecting wings." 7 Const. Assembly Debates 848.

Shri Alladi Krishnaswami Ayyar opposed it, pointing out that the United States Supreme Court had, in the past, used such a clause to interfere with social legislation, and that its inclusion in the Indian Constitution would be dangerous. He said: "This clause may serve as a great handicap for all social legislation, for the ultimate relationship between employer and labour, for the protection of children, and for the protection of women." *Id.*, 853–854.

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any state 'deny to any *person* within its jurisdiction the equal protection of the laws.' The complainants claim that this last clause applies to corporations—artificial persons.

"Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons." *Id.*, 88. And see the dissent of Justice Black in *Adamson* v. *California*, 332 U. S. 46, 68.

The Nation knew that it was the Negro, not the corporation, whose interests were to be protected by the Fourteenth Amendment. See especially the dissenting opinions in *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, 83; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 576; *Adamson* v. *California*, 332 U. S. 46, 68. But the Chief Justice interrupted counsel during oral argument in the *Santa Clara* case to say, "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." *Id.*, 396. A short time later, the Court held that corporations are "persons" within the meaning of the Due Process Clause of the Fourteenth Amendment. *Minneapolis R. Co.* v. *Beckwith*, 129 U. S. 26, 28. The way was now clear for corporate enterprises. When the practices of business

to protect themselves against reform legislation.

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made it essential to enact legislation for the protection of the public interest, the Fourteenth Amendment became a shield and a sword for protection of the vested interests.

One notable area involved price regulation. In response to the demands of midwestern farmers, who were being subjected by the railroads to excessively high freight rates, state legislatures set maximum rates for storage of grain. In *Munn* v. *Illinois*, 94 U. S. 113, the Court had taken a liberal view in favor of the validity of such legislation. The power of the States to regulate industries "affected with a public interest" was upheld, and the character of such business was broadly defined. The Court stated:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Id.*, 134.

Shortly after the Court held that corporations were "persons" within the meaning of the Fourteenth Amendment, a series of inroads were made on the *Munn* doctrine.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418, involved a state statute which provided that the rates set by a state commission were to be final and conclusive on the question what are equal and reasonable charges. The statute was held to be invalid, and ratemaking started to become a judicial, not a legislative prerogative.

A long chapter in ratemaking started in 1898 with *Smyth* v. *Ames*, 169 U. S. 466. The details of that undertaking have no place in the present Lecture. Suffice it to say that the ratemaking formula set in *Smyth* v. *Ames* was to plague public regulation. It made the ratemaking process an almost endless affair, an expensive one, and established a procedure that was needlessly complicated. See the opinion of ~~Mr.~~ Justice Brandeis in *Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 289. And see *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

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It was well established that public utilities could have their rates fixed by public authorities. What about the prices charged by other businesses?

Tyson & Bro. v. *Banton*, 273 U. S. 418, involved a New York statute which forbade the resale of any theatre ticket at a price in excess of fifty cents above that printed on the face of such ticket. The Court held that only a narrow group of enterprises were subject to price regulation, and that theatre tickets were not included:

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business . . . .

". . . a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public." *Id.*, 430, 434.

In *Williams* v. *Standard Oil Co.*, 278 U. S. 235, the Court held that the business of dealing in gasoline was not a business "affected with a public interest" and therefore not subject to price regulation by the States.

The Court had held in *Adams* v. *Tanner*, 244 U. S. 590, that a State could not forbid employment agents from receiving fees from the workers for whom they found employment. In *Ribnik* v. *McBride*, 277 U. S. 350, the Court went further and held that a State could not even fix the fees which such an agent might charge for his services. The majority attempted to distinguish between price regulation and other types of regulation. Though the Court still spoke in terms of businesses "affected with a public interest," the liberal view of that doctrine as announced in the *Munn* case was no longer applied.

Perhaps the most extreme application of the Due Process Clause as a sword and a shield against social legislation

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occurred in the labor field. In the famous case of *Lochner* v. *New York*, 198 U. S. 45, the Court held that regulation of working hours by the States was prohibited as an interference with "liberty of contract." The majority held that the general right to make a labor contract was part of the "liberty" protected by the Due Process Clause, and that the statute in question interfered with this right. The Court stated:

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go." *Id.*, 58.

Justice Holmes delivered a dissent in which he vigorously attacked the Court's efforts to fasten particular economic theories upon the country. I quote it at length because it was to become the majority view before many years passed.

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A

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more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work." *Id.*, 75–76.

The same fate met attempts to set minimum wages. In *Adkins* v. *Children's Hospital*, 261 U. S. 525, the Court held that the Due Process Clause of the Fifth Amendment

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prevented regulation by Congress of minimum wages for women in the District of Columbia. The Court turned once more to "liberty of contract," explaining:

"In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining." *Id.*, 545.

The *Adkins* decision was applied to the States, under the Due Process Clause of the Fourteenth Amendment, in *Morehead* v. *New York*, 298 U. S. 587.

The Clause was also used to frustrate efforts of labor to perfect its strength through organized, disciplined unions, as illustrated by *Adair* v. *United States*, 208 U. S. 161, and *Coppage* v. *Kansas*, 236 U. S. 1.

In *Adair*, the Due Process Clause of the Fifth Amendment was used to strike down an Act of Congress which attempted to outlaw discrimination by interstate carriers against those employees who engaged in union activities. An employee had been discharged because of his union activities, in violation of the Act. In explaining why such legislation was invalid, the Court stated:

"It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Id.*, 175.

In *Coppage*, Kansas had sought to outlaw the notorious "yellow-dog contract," under which an employee was compelled to agree not to become a member of any labor organization as a condition of obtaining and maintaining

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employment. Such contracts had served to curtail the growth of labor organizations, for the individual employee was in no position to resist the demands of an employer who requested such a contract. The following is indicative of the Court's attitude toward labor organizations in that era:

"The Act . . . is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare." *Id.*, 16–17.

Rate regulation and employer-employee relations were not the only areas in which the Court used the Due Process Clause of the Fourteenth Amendment to strike down state laws regulating business and industrial practices. A state statute, aimed at chain stores, forbade a corporation from owning a drug store unless the stockholders were licensed pharmacists. That law was struck down in *Liggett Co.* v. *Baldridge*, 278 U. S. 105. A state statute attempting to limit the number of ice dealers in a given area met a similar fate. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. See also *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

Perhaps *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, best illustrates the extreme to which the Court went in invalidating legislation under the Fourteenth Amendment. A Nebraska statute prescribed the minimum weights of loaves of bread; and, in order to prevent the palming off of smaller for larger sizes, it fixed maximum as well as minimum tolerances. This was intended to prevent a

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loaf of one class from being increased in size until it could be sold for a loaf of the next larger standard size. The Court considered the merits of the measure as a means of preventing fraud (an end which was concededly legitimate) and determined that a better means should have been found to effectuate the legislative intent. Therefore, the measure was held invalid. Justices Brandeis and Holmes dissented, pointing out:

"To decide, as a fact, that the prohibition of excess weights 'is not necessary for the protection of the purchasers against imposition and fraud by short weights'; that it 'is not calculated to effectuate that purpose'; and that it 'subjects bakers and sellers of bread' to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature—not the performance of the constitutional function of judicial review." *Id.*, 534.

Beginning in the 1930's, the Court gradually desisted from using the Due Process Clause of the Fourteenth Amendment to defeat social legislation. Precedents were overruled, their underlying philosophy was rejected, and the liberal attitude first voiced in *Munn* v. *Illinois*, 94 U. S. 113, was once more adopted.

One of the first areas to witness the change was that of price regulation. In *Tagg Bros.* v. *United States*, 280 U. S. 420, it was held that an Act of Congress which provided for regulation of the charges of commission agents at stockyards did not violate the Due Process Clause of the Fifth Amendment.

O'Gorman & Young v. *Hartford Ins. Co.*, 282 U. S. 251, upheld the power of the States to regulate insurance rates. Justice Brandeis, who had dissented from the earlier restrictive views of the Court, delivered the majority opinion for a closely divided Court, which held that the insurance business was so far affected with a public interest that the State might regulate its rates.

New York sought to prevent destructive price-cutting in the milk industry by setting minimum prices for the sale of milk. This provision was challenged as a violation

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of Due Process. The Court upheld the provision, rejecting the contention that price regulation was to be regarded as particularly suspect. *Nebbia* v. *New York*, 291 U. S. 502. In adopting a liberal view of the class of businesses affected with a public interest, the Court stated:

"If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Id.*, 538–539.

In *Olsen* v. *Nebraska*, 313 U. S. 236, a Nebraska statute limiting the fees which could be charged by private employment agencies was upheld, and *Ribnik* v. *McBride*, 277 U. S. 350, was overruled.

A similar approach was adopted in regard to legislation dealing with employer-employee relations. A statute of the State of Washington which set minimum wages for women was upheld in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, and the *Adkins* case was accordingly overruled.

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A Nebraska constitutional amendment and a North Carolina statute provided that no person should be denied an opportunity to obtain or retain employment because he was or was not a member of a labor organization. These "right-to-work" statutes forbade employers to enter into "closed shop" agreements, obligating themselves to exclude persons from employment because they were not members of labor unions. The Court, rejecting the views of *Coppage* and *Adair*, refused to strike down these measures as violative of Due Process. *Lincoln Union* v. *Northwestern Iron Co.*, 335 U. S. 525.

In *Asbury Hospital* v. *Cass County*, 326 U. S. 207, a statute of North Dakota required corporations, owning farm land not reasonably necessary in the conduct of their business, to dispose of it within ten years after the effective date of the Act. A foreign corporation owning farm land, which it had acquired prior to the Act, challenged the validity of the statute. The Court upheld the statute.

California Automobile Assn. v. *Maloney*, 341 U. S. 105, involved a state statute which required all liability insurers in the State to participate in a plan for apportioning applicants for automobile liability insurance who were unable to obtain such insurance through ordinary channels. One insurance company, which was engaged in writing insurance for members of an automobile club having a select membership, complained that the plan would require it to write insurance for nonmembers who were poor risks, thereby violating the Due Process Clause. The plan had been adopted to enable certain persons who would not otherwise be able to comply with the State's financial responsibility laws to obtain insurance which, in some cases, was a prerequisite to the operation of motor vehicles in the State. This statute was also upheld.

The present attitude of the Court toward the Due Process Clause is illustrated by *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421. In that case the Court upheld a Missouri statute which provided that any employee,

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entitled to vote, might absent himself, on election days, from his employment for four hours, while the polls were open, and that it would be unlawful for an employer to deduct wages for that absence. The Court stated:

"The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases." *Id.*, 424–425. And see *Williamson* v. *Lee Optical*, 348 U. S. 483.

This does not mean that legislators have *carte blanche*, that the States can enact any laws they choose, that there are no limits to regulation. While the Court these days does not strike down laws because it deems them unwise, improvident, or inexpedient, it stands ready to act once the outside limits have been breached. What those limits are is impossible to define, except in terms of the concrete. And the illustrations to date are rare because of the liberality of the present Court in applying the test of constitutionality to social legislation. When social legislation alone is considered, that is to say, legislation touching on economic, business, community or fiscal matters, the Court since its reconstitution under Roosevelt beginning in 1937, has struck down no such laws, national or local, on the ground of unconstitutionality under the Due Process Clause. *Tot* v. *United States*, 319 U. S. 463, comes close enough, however, to that classification to warrant mention. It was not a case touching on social legislation, in the sense of *Munn* v. *Illinois* and the later cases, already discussed. It involved The Federal Firearms Act,

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which made it a crime for a person who had been convicted of a crime of violence or who was a fugitive from justice to receive any firearm or ammunition which had been shipped in interstate commerce. The critical provision of the Act stated that "the possession of a firearm or ammunition by any such person shall be presumptive evidence" that the firearm or ammunition was shipped in interstate commerce. 15 U. S. C. § 902 (f).

Tot, who had a criminal record in the state courts, was found in New Jersey in possession of a pistol manufactured in Connecticut and shipped by the factory to Illinois. There was no evidence that Tot had received the pistol from an interstate shipment. Unless he had so received it, the federal prosecution would fail. The government, therefore, relied on the presumption stated in the statute. Tot was convicted and his conviction was set aside.* Due process, said the Court, requires that "there be a rational connection between the facts proved and the fact presumed." *Id.*, 467. ". . . where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." *Id.*, 468.

Due process in the United States continues to have a substantive, as well as a procedural significance. The judiciary is committed to protect the citizen against arbitrary and capricious acts both of the federal and the state legislatures. But the zone for legislative action, though

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*For the use in income tax prosecutions of the presumption of the receipt of income by reason of one's expenditures or net worth see *United States* v. *Johnson*, 319 U. S. 503; *Holland* v. *United States*, 348 U. S. 121. Cf. *Naik* v. *Orissa*, 17 Sup. Ct. Jour. 537, where the Supreme Court of India sustained a conviction of a public servant for criminal misconduct in the discharge of his duties. The Act, under which the conviction was obtained, provides that if the accused is in possession of property disproportionate to his known sources of income and does not satisfactorily explain the fact, the Court shall presume that the accused is guilty.

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not limitless, is broad. The judiciary no longer sits as a super-legislature. The judiciary no longer undertakes to measure the constitutionality of legislation by the standards or requirements of any particular school of economic thought.

D. *Privileges or Immunities.*

We have seen how the Due Process Clause was used to curtail the power of the States to pass reform legislation, aimed at protecting the citizen against abusive practices of business groups. It seemed at times that another clause of the Fourteenth Amendment might be used with the same ~~devasting~~ effect. That result was, indeed, avoided by only the narrowest of margins.

The Fourteenth Amendment provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The words "privileges" and "immunities" are not defined. What is their reach? A case from Louisiana put the problem squarely and directly, shortly after the Fourteenth Amendment was ratified.

The legislature of Louisiana (under the influence of the "carpet bag" government imported from the North to rule the State in the turbulent days following the Civil War) passed a statute granting to one company a monopoly of the slaughterhouse business in certain parishes, including the City of New Orleans. This law deprived about 1,000 persons of the right to engage in that business. The right of a State to establish such a monopoly had been challenged in the legislature. The battle that was lost there was transferred to the courts, and finally reached the Supreme Court in 1873 in the famous *Slaughter-House Cases*, 16 Wall. 36. Prior to the Fourteenth Amendment, Louisiana could have created a monopoly of one business or another as she chose. It was claimed that the Fourteenth Amendment barred such action. The right to enter or conduct a trade or business, it was argued, was a "privilege" of a citizen; and one of his "immunities"

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was the right to be free of state-created monopolies. If the claim was correct, then each citizen had an undefined set of "privileges" and "immunities," newly protected against state action. These would not only be rights which could be enforced in the courts; they would also be rights which by reason of Section 5 of the Fourteenth Amendment, Congress could protect by limiting in advance the legislative power of the States.

The Court rejected that broad construction, pointing out that it would seriously disturb the balance between State and Nation, constitute a great "departure from the structure and spirit of our institutions," "fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character," and radically change "the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people." *Id.*, 78.

The privileges or immunities, guaranteed against state action, are not "those which belong to citizens of the States as such." *Id.*, 78. The Fourteenth Amendment protects only those "privileges" or "immunities" "which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, 79. Those federal rights include the right to go to the seat of government and seek its protection (*Crandall* v. *Nevada*, 6 Wall. 35), the right to free movement interstate (cf. *Edwards* v. *California*, 314 U. S. 160), the right to *habeas corpus*, the right to protection on the high seas or in a foreign nation, the right to freedom from slavery. *Slaughter-House Cases*, 16 Wall. 79–80. But the rights of citizens deriving from state laws are not "privileges" or "immunities" within the meaning of the Fourteenth Amendment. So held the Court by a narrow margin of five to four in the *Slaughter-House Cases*. And by so holding it kept the equilibrium between state and federal government from being drastically altered by the Fourteenth Amendment.

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Charles Warren, *II The Supreme Court in United States History* (1937), 542–543, wrote that the ruling in the *Slaughter-House Cases* was "undoubtedly in accord with the temper of the times. The country was tiring of the extensions, and, in some circumstances, usurpations of Federal power which had been the natural outcome of war and of war necessities. The decision marked the end of the great centralizing, Nationalistic movement, and the beginning of a reaction towards the enhancement of the powers of the States."

The protection sought by the businessmen of Louisiana under the Privileges and Immunities Clause of the Fourteenth Amendment was also denied under the Due Process and Equal Protection Clauses.

So it was that the sovereignty of the States was protected by the narrowest of margins. Had the minority in the *Slaughter-House Cases* prevailed, the alteration in the American federal system would have been as basic as it would be in India if the items on the State List were transferred to the Concurrent List.

The judicial definition of the "privileges or immunities" of national citizenship has been a rather narrow one.* The broad definition advocated by the minority in the *Slaughterhouse Cases* has never been adopted. The following rights have been *denied* that protection: the right to

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*In *Toomer* v. *Witsell*, 334 U. S. 385, 395, the Court held that a South Carolina statute which discriminated against non-residents by practically excluding them from commercial shrimping operations violated the Privileges and Immunities Clause of Article IV, Section 2, providing: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." For other instances in which the prohibition of Article IV, Section 2, has been held violated, see *Ward* v. *Maryland*, 12 Wall. 418 (discriminatory rates on non-resident sellers); *Blake* v. *McClung*, 172 U. S. 239 (priority to local creditors); *Chalker* v. *Birmingham & N. W. R. Co.*, 249 U. S. 522 (tax rate based on whether taxpayer has chief office in the State); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (tax exemptions allowed to residents only); *Mullaney* v. *Anderson*, 342 U. S. 415 (license fee on non-resident fishermen ten times that on residents).

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practice law in a state court (*Bradwell* v. *State*, 16 Wall. 130); the Eighth Amendment's prohibition against cruel and unusual punishment (*In re Kemmler*, 136 U. S. 436); the Seventh Amendment's guarantee of a jury trial in civil cases (*Walker* v. *Sauvinet*, 92 U. S. 90); the Second Amendment's right of the people to bear arms (*Presser* v. *Illinois*, 116 U. S. 252); the Fifth and Sixth Amendments' requirements of jury trial in criminal cases and prosecution by indictment (*Maxwell* v. *Dow*, 176 U. S. 581); the right to sell liquor (*Bartemeyer* v. *Iowa*, 18 Wall. 129); the right to suffrage (*Minor* v. *Happersett*, 21 Wall. 162, *Breedlove* v. *Suttles*, 302 U. S. 277); the right to display the flag for advertising (*Halter* v. *Nebraska*, 205 U. S. 34); the privilege against self-incrimination guaranteed by the Fifth Amendment (*Twining* v. *New Jersey*, 211 U. S. 78); the right to fraternity membership in a state college (*Waugh* v. *Board*, 237 U. S. 589); the right to graze sheep on ~~in~~ public lands (*Omaechevarria* v. *Idaho*, 246 U. S. 343); the right to inheritance, free of death taxes (*Maxwell* v. *Bugbee*, 250 U. S. 525); the right to attend a state university (*Hamilton* v. *Regents*, 293 U. S. 245); the right to membership in an oath-bound association (*Bryant* v. *Zimmerman*, 278 U. S. 63); the right to avoid double jeopardy, as guaranteed by the Fifth Amendment (*Palko* v. *Connecticut*, 302 U. S. 319); and the right to run for state office (*Snowden* v. *Hughes*, 321 U. S. 1).

In *Hague* v. *C. I. O.*, 307 U. S. 496, a few members of the Court expressed the view that freedom to disseminate information concerning the provisions of the National Labor Relations Act, a federal statute, and to assemble peaceably for discussion of the Act, was a privilege or immunity of a citizen of the United States secured by the Fourteenth Amendment. Justice Stone protested that this was an undue extension of the category of privileges and immunities. His fears doubtless stemmed from *Colgate* v. *Harvey*, 296 U. S. 404, decided in 1935, holding that the right of a citizen of the United States to engage in business, including the making

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of loans of money in States other than his State of residence, is a privilege or immunity of national citizenship protected against state action by the Fourteenth Amendment. The *Colgate* case struck down a Vermont law, taxing interest on money loaned outside Vermont, while exempting interest on loans made within the State. The privilege of acquiring, owning, and receiving income from investments without the State was held to be a privilege of federal citizenship. The alarms sounded by Justice Stone in his dissent were not false ones. If the doctrine of the *Colgate* case had prevailed, the ground lost under the Due Process Clause might well have been regained under the Privileges and Immunities Clause. But the *Colgate* case was short-lived, being overruled in 1940 by *Madden* v. *Kentucky*, 309 U. S. 83, which held that such financial activities were not privileges of national citizenship. And see *Snowden* v. *Hughes*, 321 U. S. 1. Today, therefore, the Court stands firmly with the majority view in the *Slaughter-House Cases*.

While the Constitution of India does not contain a Due Process Clause, it does contain limitations on arbitrary legislative action in the area of social legislation by virtue of Article 19 (1)(g), which provides that all citizens shall have the right to carry on any profession, trade, or business, subject to the reasonable restrictions provided for in Article 19 (6). And see Article 19 (1)(f). The operation of this provision is illustrated by the decision of the Supreme Court of India in *Hussain* v. *District Board*, 41 A. I. R. 630.

In the *Hussain* case, the operator of a cattle market challenged the validity of a local regulation which prohibited the operation of cattle markets. The court held the regulation void as a violation of Article 19 (1)(g). The court relied on its earlier decision in *Ahmed* v. *Municipal Board*, 13 Sup. Ct. Jour. 324, which held that a local regulation granting a monopoly in the wholesale vegetable business and thereby preventing a would-be

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dealer from carrying on such business violated Article 19 (1)(g). And see *Bombay* v. *Balsara*, 14 Sup. Ct. Jour. 478; *Yasin* v. *Town Area Committee*, 15 Sup. Ct. Jour. 162; *Rajasthan* v. *Nath Mal*, 41 A. I. R. 307. Thus the result reached in the *Ahmed* case on the basis of Article 19 (1)(g) was analogous to that which was sought in the *Slaughter-House Cases*, though on a much narrower basis than that advanced in the latter case.*

In the latter 1940's, it appears that the Government of Uttar Pradesh decided to run its own buses on public thoroughfares, and eventually decided to establish a state monopoly in this area. At first, an attempt was made to achieve this result under the Motor Vehicles Act, which provided for permits to operate such vehicles. Pursuant to that plan, the transport authorities began to cancel and refuse permits to private operators. In *Moti Lal* v. *Uttar Pradesh*, 38 A. I. R. 257, the High Court of Allahabad held that such nationalization of an industry was not possible by mere executive action without supporting legislation.

Thereafter, the state government passed legislation designed to authorize such a state monopoly of road transport, and the validity of this legislation came before the Supreme Court of India in *Ahmad* v. *Uttar Pradesh*, 17 Sup. Ct. Jour. 819. After this law became effective, Article 19 was amended so that it now expressly permits

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*In *Indian M. & M. Corp.* v. *Industrial Tribunal*, 40 A. I. R. 98, the High Court of Madras held that the right to carry on a business, as secured by Article 19 includes the right to decline to carry on business, and therefore the owner cannot be compelled to continue in business against his will.

In *Singh* v. *Court of Wards*, 16 Sup. Ct. Jour. 505, the Supreme Court held unconstitutional a law which permitted the Court of Wards to assume superintendence of the property of a landlord who habitually infringed the rights of his tenants. The Court held the law to be a violation of Article 19 (1)(f) of the Constitution and not saved by Article 31–A excepting from the restrictions in Article 19 a law "providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights."

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nationalization.* ~~Hence the amendment was not in effect at the time of the Act.~~ The Court proceeded to decide whether such a state monopoly could be regarded as a reasonable restraint on the rights of private bus operators to carry on their trade. In holding that the monopoly was not such a reasonable restriction, the Court stated: "In order to judge whether State monopoly is reasonable or not, regard . . . must be had to the facts of each particular case. . . ." *Id.*, 738. One factor which was regarded as of importance in the case was that many private bus operators would be put out of business and deprived of a chance at a livelihood without receiving any compensation, thus violating the spirit of Article 39 (a) of the Directive Principles.**

A contention that the legislation conflicted with Article 14*** by discriminating in favor of the State was rejected. But the court held that, while no tangible property was being taken, the Government was depriving the bus operators of the business of running buses on public roads, and therefore the legislation conflicted with Article 31 (2) as a taking of property without compensation.

The Supreme Court of India has not applied the doctrine of the *Ahmed* case in the extreme. Thus in ~~Gooter~~

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*Article 19 (6), as amended in 1951, provides that Article 19 (1) (g) shall not prevent any law that in the interests of the general public imposes reasonable restrictions on the rights conferred by that Article, and expressly saves laws relating to:

"(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

"(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

**Article 39 (a) provides:

"The State shall, in particular, direct its policy towards securing—

"(a) that the citizens, men and women equally, have the right to an adequate means of livelihood."

***Article 14 provides:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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jee v. Bharucha, 17 Sup. Ct. Jour. 246, a state law, regulating the liquor business, gave the Commissioner authority to grant licenses for the manufacture or sale of liquor, to restrict the number of establishments, and to license them by auction to the highest bidder. One who lost out to the highest bidder on the sale of a license to a liquor shop contended that the law deprived him of the right guaranteed by Article 19 (1) (g) of the Constitution. The Court sustained the law as a "reasonable" regulation under Article 19 (6). The fact that the law created a monopoly did not *per se* make it invalid. (1) Since the liquor business was involved, there was great leeway for regulation because of its special dangers. (2) The monopoly created was after public auction of the monopoly.

In *Bijay Cotton Mills* v. *Ajmer*, 18 Sup. Ct. Jour. 51, it was contended that minimum wages legislation conflicted with the fundamental rights of employers and employees to engage in business and trade, as guaranteed by Article 19 (1) (g). It was argued that the Government was free, under the Act, to set arbitrary wage scales which could not be further challenged, and that such wages could force even well-meaning employers out of business. The Court, speaking through Chief Justice Mukherjea, upheld the validity of the legislation as reasonably imposed in the public interest under Article 19 (6). The object of the Act, *viz.*, the securing of living wages needed for health and decency, was said to be clearly valid. Any restraint the Act imposed on freedom of contract was held not to be unreasonable. The Court ruled that hardship in the case of individual employers would not render the Act invalid. The machinery for setting wages, which included provision for advisory bodies representing employers, employees, and the public, was held to afford adequate safeguards against hasty or capricious action. Lack of provision for further review of the Government's decision, the Court said, would not, of itself, make the Act unreasonable.

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E. *The Taking of Property.*

The basic rights protected by the United States Constitution include security of property as well as of the person. As I have already pointed out, the prohibition against the taking of property by the government except for public purposes and upon payment of just compensation is one of the preferred rights secured against the Federal Government by the Fifth Amendment ". . . nor shall private property be taken for public use, without just compensation" and against state governments by the Due Process Clause of the Fourteenth Amendment.

The question of what constitutes a taking was considered in the *Legal Tender Cases*, 12 Wall. 457, in which congressional enactments declaring treasury notes legal tender were upheld, as applied to debts contracted before and since the passage of the Acts. In rejecting a claim that this constituted a taking within the meaning of the Fifth Amendment, the Court stated that that guarantee only applied to a direct appropriation, and not to "consequential injuries resulting from the exercise of lawful power." *Id.*, 551. "A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses . . . . But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?" *Id.*, 551.

The distinction between a taking and consequential injuries is sometimes difficult to make. On the one hand are regulatory measures which affect the value of property—laws which zone an area, prohibiting certain types of buildings; laws which set maximum hours of work and minimum wages; laws which fix the price or the rate which may be charged. All such social legislation affects values. But such laws are nonetheless constitutional. See *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 601. On the other extreme are cases where

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the Government has asserted an authority over the property that amounts to a kind of servitude.

In *United States* v. *Dickinson*, 331 U. S. 745, the property owner was held entitled to compensation for the permanent flooding of his land by virtue of construction of a dam which raised the level of a river. The Court stated the test as follows: "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Id.*, 748.

In *United States* v. *Causby*, 328 U. S. 256, military planes from a nearby airport skimmed regularly over a nearby chicken farm and seriously impaired the farm's use. The Court held that this constituted a taking of property within the meaning of the Fifth Amendment, pointing out that such interference with surface use by repeated low altitude flights caused as substantial an invasion of the owner's property interests as would interference at the surface level of the land.

The extent to which the Court has gone in requiring compensation is indicated by *United States* v. *General Motors Corp.*, 323 U. S. 373, where compensation was required for the temporary occupancy of a portion of a leased building held by a tenant under a long term lease. The term "property" in the Fifth Amendment was said to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. That interest is compensable, whether it be the fee simple or an estate for years. "The constitutional provision is addressed to every sort of interest the citizen may possess," said the Court. *Id.*, 378.

The Indian Constitution also guarantees property rights. The interpretation of their scope is of special importance in the development of the vast programs for land reform and economic development which the Government has under way.

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involved the type of acquisition contemplated by Article 31. See *Singh* v. *Bihar*, 37 A. I. R. (Pat.) 392.

These new Articles state that no law providing for acquisition by the State of any estate or right therein or for extinguishment or modification of such rights shall be held void as infringing any fundamental rights as, for example, those guaranteed by Article 19. They further provide that such laws, when passed by state legislatures, must receive the assent of the President. But after the Amendments, as well as before, compensation must be paid for any property taken.

Thus while the 1951 Amendments curtailed the area of justiciable controversy in matters involving land reform, they did not eliminate the role of the courts as guardians of property rights.

In *Bihar* v. *Singh*, 15 Sup. Ct. Jour. 354, the Supreme Court of India held that the state legislature had exceeded its powers to fix compensation, under Item 42 of List III, by a colorable exercise of those powers in creating artificial deductions which were not really designed to fix compensation but rather to deprive persons of their property without payment of compensation.

A leading Indian case on the problem as to what constitutes a taking is *West Bengal* v. *Gopal*, 41 A. I. R. 92, decided by the Supreme Court. A Bengal law was enacted which operated retrospectively to restrict the rights of a purchaser of land to evict undertenants. Chief Justice Patanjali Sastri stated that the term "taken possession of or acquired" in Article 31 (2) covers only an appropriation or abridgment which amounts to a deprivation of ownership. The test suggested was whether a statute withheld the property from the possession and enjoyment of the owner or seriously impaired its use or enjoyment by him, or materially reduced its value. Applying these principles, the Court held that the legislation was in line with traditional tenancy legislation, affording relief to tenants, and did not amount to a deprivation of property under Article 31.

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In *Ahmad* v. *U. P.*, 41 A. I. R. 728, to which I referred earlier, a state monopoly of motor transport was held to infringe rights of private bus operators under Article 31 (2). The Court pointed out that while no tangible property was taken, the government was depriving bus operators of the business of running buses on public roads, and this constituted a taking of property without compensation.

In *Shrinivas* v. *Sholapur Spinning & Weaving Co.*, 17 Sup. Ct. Jour. 175, the government of Bombay took over a cotton mill, in the sense that it appointed new directors who undertook the management of the mill.* The reason was the desire to keep up production of an essential commodity and avoid serious unemployment. The new management passed a resolution making a call on the preference shares. A preference shareholder sued, challenging the validity of the law under which the government took over the mill. The Supreme Court held this was a taking of property within the meaning of Article 31 (2) of the Constitution. Justice Mahajan explained: ". . . under the guise of superintendence the State is carrying on the business or trade for which the company was incorporated with the capital of the company . . . ." *Id.*, 183. The purpose was held to be a "public purpose viz; to keep the labour going and contented and to maintain the supply of essential commodity." *Id.*, 183. But the seizure could not be constitutionally consummated without payment of compensation as provided in Article 31 (2). Justice Mahajan stated that Article 31 "gives complete protection to private property as against executive action, no matter by what process a person is deprived of possession of it. . . . It is immaterial to the person who is deprived of property as to what use the State makes of his property or what title it acquires in it . . . . In

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*For a discussion of the constitutionality of this law in other respects see Lecture XI.

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the present case nothing has been left with the company but the mere husk of title." *Id.*, 189, 190.

In *Rajasthan* v. *Nath Mal*, 17 Sup. Ct. Jour. 404, the Supreme Court of India upheld a state law freezing stocks of food grains held by any person, so as not to allow the food grains to be sold without consent of the government. This regulation was held not to violate Article 19 (1)(g) of the Constitution. But the Court went on to hold unconstitutional a provision of the law that "such stocks shall also be liable to be requisitioned or disposed of under orders of the said authority at the rate fixed for purposes of Government procurement." This provision left it entirely to the government "to requisition the stocks at any rate fixed by it and to dispose of such stocks at any rate in its discretion." *Id.*, 406. "The present is a typical case which illustrates how the business of a grain dealer can be paralysed for it is admitted that while the Government procurement rate is Rs. 9 a maund, the market rate was Rs. 17 or Rs. 18 per maund, with the result that the stockholder suffered nearly cent. per cent loss, while the Government made a profit of Rs. 4–5–4 per maund on the stock requisitioned." *Id.*, 407. The provision therefore violated Article 31 (2) of the Constitution.

In India, as in America, the question whether the taking is for a public purpose is a justiciable question. *Berman* v. *Parker*, 348 U. S. 26, involved the validity of an Act of Congress, which provided for the condemnation of property in blighted areas of the District of Columbia so as to eliminate and prevent slum and substandard housing conditions. In upholding this legislation, the Court stated that the task of determining public purposes was primarily one for the legislature, with the judiciary exercising an extremely narrow power of review to determine whether the requirements of the Fifth Amendment had been met. "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual

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as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id.*, 33.

Except where restricted by the express terms of Articles 31, 31A and 31B, the Indian courts also pass on the question of public purpose. In *Singh* v. *Vindhya Pradesh*, 41 A. I. R. 24, 29, the J. C.'s Court of Vindhya Pradesh passed on the constitutionality of a law providing for the acquisition of Mahua trees. The Court determined that such acquisition was for a public purpose, saying that the Mahua tree is "not merely just a piece of private property, but one of general public utility, especially in times of famine." *Id.*, 29.

In *Nabhirajiah* v. *Mysore*, 15 Sup. Ct. Jour. 490, a property owner objected to an order which directed him to lease certain premises to a children's school. The Supreme Court held that the law in question, which dealt with the regulation of letting of houses, was "the exercise of a police power," and not "the exercise of a power of eminent domain, in which case alone questions relating to compensation and public purpose will arise." *Id.*, 495.

A recent leading case is *Bombay* v. *Munji*, 18 Sup. Ct. Jour. 10. First of all, the Court held that Article 19 (1) (f) does not apply to cases where there is a total deprivation of property. In such cases, Article 31 alone must be relied on, and this is true even though some formal semblance of title remains. In that case, the right to occupy, transfer, or lease the premises had been taken, and this was held to bring Article 31, rather than Article 19 (1)(f), into play. "What is left," said the Court, "is but the mere husk of title in the leasehold interest: a forlorn hope that the force of this law will somehow expend itself before the lease runs out." *Id.*, 12.

The Court then considered the problem of public purpose, and held that that requirement had been met since the legislation was designed to "house the homeless."

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". . . the housing situation in Bombay was acute, largely due to the influx of refugees. Questions of public decency, public morals, public health and the temptation to lawlessness and crime, which such a situation brings in its train, at once arose; and the public conscience was aroused on the ground of plain humanity. A race of proprietors in the shape of rapacious landlords who thrived on the misery of those who could find no decent roof over their heads sprang into being. Even the efficiency of the administration was threatened because Government servants could not find proper accomodation. Milder efforts to cope with the evil proved ineffective. It was necessary therefore for Government to take more drastic steps and in doing so they acted for the public weal. There was consequently a clear public purpose and an undoubted public benefit." *Id.*, 13. In carrying out this public purpose, considerable leeway must be left to the Government agencies concerned, said the Court, an attitude reflected by our own Supreme Court in *Berman* v. *Parker*, 348 U. S. 26.

When there is a taking for a public purpose, the question remains whether adequate provision has been made for compensation.

In the leading case of *United States* v. *Miller*, 317 U. S. 369, the Court stated that the "just compensation" required by the Fifth Amendment meant "the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *Id.*, 373. The owner in such cases is entitled to the fair market value as of the date of the taking, or what a willing buyer would pay in cash to a willing seller. Even this rather broad standard must be qualified to some extent, said the Court, so as to eliminate special factors which might make the property of special value to the condemner. The chief issue in the *Miller* case was whether the owner should have the benefit of any increase in value due to prior condemnation of adjacent lands. The

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Such was the state of Indian constitutional law regul ting the
king of property down to April 27, 1955. On that date a amend
e Article 31 became effective which substituted for Claus the
llowing clauses:

(2) No property shall be compulsorily acquired or
tioned save for a public purpose and save by authority
which provides for compensation for the property so acquisi-
sitioned and either fixes the amount of the compensati
the principles on which, and the manner in which, the
is to be determined and given; and no such law shall be
question in any court on the ground that the compensa
by that law is not adequate.

(2A) Where a law does not provide for the transf
ownership or right to possession of any property to the
a corporation owned or controlled by the State, it sha
deemed to provide for the compulsory acquisition or req
ing of property, notwithstanding that it deprives any p
property.

These new clauses have not yet been authoritatively con
ld seem, however, that the question of a public purpose i
ticiable issue in India. So also is whether property has
question of the reasonableness of the compensation, howeve
or/justiciable one, the courts being confined to determin
formula for compensation provided by the legislature has b

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(page 2)

s India has broken with one tradition of the law of eminent
Some say that she did so only under the compulsion of making
ible the breaking-up of huge estates and the distribution of lands
villagers. Where, for example, one man owns all or most of a
it might well be beyond the fiscal ability of the people to pay
mpensation in the American sense. Others say the driving force
the 1955 Amendment was ideological - an expression of the
st philosophy. Whatever the cause the 1955 Amendment casts a
ver every private factory, plant, or other individual enterprise
a. The legislature may now appropriate it at any price it desires -
ntial or nominal. There is no review of the reasonableness of
unt of compensation. The result can be just compensation or
cation - dependent wholly on the mood of the Parliament.

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Court held that he would be so entitled only where his lands were not probably within the scope of the project from the time the Government was committed to it.

The amount of compensation also apparently presents a justiciable constitutional issue in India. That was the holding of the Supreme Court of India in *West Bengal* v. *Banerjee*, 17 Sup. Ct. Jour. 95. A state law had made the maximum compensation payable for the taking of property its market value on December 31, 1946. As has been noted, Article 31 (2) of the Constitution provides that no property shall be taken for a public purpose unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

The Court held that the compensation payable must be "a just equivalent of what the owner has been deprived of" (*id.*, 98) and that that requirement was not met in all cases by referring the valuation to December 1, 1946. ". . . it is common knowledge that since the end of the war, land, particularly around Calcutta, has increased enormuosly in value and might still further increase very considerably in value when the pace of industrialisation increases. Any principle for determining compensation which denies to the owner this increment in value cannot result in the ascertainment of the true equivalent of the land appropriated." *Id.*, 99. Cf. *Deo* v. *Orissa*, 16 Sup. Ct. Jour. 592.

Summary.

In the United States, neither the Due Process Clause nor the Privileges and Immunities Clause stands today as a major obstacle to social reform. But the former especially serves an important role in our system of checks and balances. The Due Process Clauses of the Fifth and Fourteenth Amendments are a source of reserved power for the judiciary, which can be called upon to restrain

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LECTURE VIII

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When it came to the taking of property, both performed the same
and spoke with the same authority before India in 1955 amended her
stitution so as to leave to the legislature, rather than to the courts,
question of what constitutes reasonable compensation for the taking.
, India, like America, ranked property rights high among the
ental rights of man. What effect the 1955 Amendment will have
ins to be seen. If the Parliament appropriates private property
nly nominal compensation the spectre of confiscation would have
ed India contrary to the teachings of her outstanding jurists.

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the legislative and executive branches when they go beyond the limits.

The power is a potent one, because it is undefined except by the judiciary itself. The judiciary today, however, is the first to recognize that the Due Process Clauses should not be used to substitute its judgment on policy for that of the other two branches of government. Accordingly, the area of the reserved power contained in the Due Process Clauses is, as a practical matter, restricted.

The Court's present attitude thus gives considerable free play to the political branches. The courts no longer sit as a super-legislature. Only when the broad limits are transcended by executive or legislative action and the rights of citizens impaired does the judiciary intervene. The right to step in and exercise the reserved power in the Due Process Clauses is, however, an important power, central in our scheme of things.

The Indian courts have powers narrower than ours in some respects and as broad as ours in others. There is no Due Process Clause in the Indian Constitution. But Article 19 (1)(f) and (g) guarantee important rights—the right to acquire, hold and dispose of property, and the right to practice a profession and carry on an occupation, trade, or business. While these rights may be regulated, the regulations must be "reasonable" (Article 19 (5) and (6)); and it appears that the Supreme Court of India is the ultimate interpreter of what is "reasonable" in a given case. So when it comes to laws regulating property rights, the judiciary in India speaks with almost the same authority as the judiciary in America.

~~When it comes to the taking of property, both perform the same role and speak with the same authority. Both India and America are opposed to confiscation. Both rank property rights high among the fundamental rights of man.~~

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APPENDIX I

The Virginia Declaration of Rights of June 12, 1776

1. THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

3. That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

5. That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they

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were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for publick uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the publick good.

7. That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

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12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.

13. That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

14. That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of *Virginia*, ought to be erected or established within the limits thereof.

15. That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

APPENDIX II

The United States Constitution

The First ~~Ten~~ Amendments

Eight

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

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AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been pre-

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viously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX III

The United States Constitution

The Thirteenth, Fourteenth and Fifteenth Amendments

AMENDMENT XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

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SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Con-

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gress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX IV

FUNDAMENTAL RIGHTS OF THE INDIAN CONSTITUTION.*

Article 12

In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India

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*Major rights, guaranteed by the American Constitution and not found in the Constitution of India, are: a prohibition of bills of attainder and impairment of obligations of contract, restrictions on search and seizure, guarantees of grand jury indictment and trial by jury in criminal cases, guarantees of confrontation and compulsory process to procure witnesses, right to jury in civil cases, prohibition of excessive bail and cruel and unusual punishment, and a guarantee of due process of law.

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and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Article 13

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Article 14

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

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(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 16

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which,

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in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 17

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Article 18

(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Article 19

(1) All citizens shall have the right—

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;

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(e) to reside and settle in any part of the territory of India;

(f) to acquire, hold and dispose of property; and

(g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said

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sub-clause, shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 20

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Article 21

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person

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shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained

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for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Article 23

(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24

No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Article 25

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

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(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

Article 27

No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has

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been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premise attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Article 29

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 31

(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or

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acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding any thing in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be

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submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

Article 31–A.

(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received assent.

(2) In this article,

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant;

(b) the expression "rights," in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

Article 31–B.

Without prejudice to the generality of the provisions contained in Article 31–A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have

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become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

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TAGORE LECTURES

IX

The Fundamental Rights of Speech, Press and Religion

A. *Freedom of Speech.*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." There are no exceptions. The mandate is in terms of the absolute. Unlike India's Constitution,* there is no leeway for legislative innovations. The prohibition is all-inclusive and complete. The word "no" has a finality in all languages that few other words enjoy.

As we have seen, the introduction of the right of freedom of speech into the American Constitution marked a break with tradition. There had been no such guaranty in the constitution of any State. The First Amendment, therefore, made a great innovation. Moreover, the First Amendment was long thought to apply only to the national government, not to the States. While Congress

*Article 19 (1) provides that

"All citizens shall have the right—

"(a) to freedom of speech and expression."

Article 19 (2), however, provides

"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

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could make "no" law abridging freedom of speech, the States could make some. Even when the Fourteenth Amendment was adopted and the States were prohibited from depriving any person of life, liberty, or property "without due process" of law, it was still assumed that the First Amendment was inapplicable to the States.

But, as noted, there has been a great change during the last twenty years, a change resulting from judicial statesmanship in expanding due process to include freedom of speech. And so it came to pass that the guaranty of freedom of speech to all persons—citizens and aliens alike—is today good against both the federal and the state governments.

No one in American history has better expounded the political theory behind this guaranty of freedom of speech than Thomas Jefferson. He wrote his famous article of faith on freedom of speech in 1779:

"That the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or suffer from his own; that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them."

Jefferson's theory and the idea espoused by John Stuart Mill had common ground. Mill wrote, "If all

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mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

Of course, neither the American nor Indian law has ever sanctioned unrestrained and unlimited free speech. The laws of slander, libel and blasphemy have deep roots in Anglo-American and Anglo-Indian law. A person who can be sued for what he says, one on whom judgments for damages can be fastened for what he utters, one who can go to jail because of his talk, may be at liberty to speak, but he does not enjoy freedom of speech in the full sense.

When we start with freedom of speech, we start, in other words, with a concept somewhat limited by reason of its special history.

Of course, a person who utters obscene language can be punished. Of course, one who defames another's character can be held to account in a court of law. Jefferson knew these things. When he spoke of freedom of speech, he described a different level of discourse.

Jefferson meant, I think, that all subjects should be left open for free and unlimited discussion and debate. One may not slander another; but the law of slander and its efficacy should be open to inquiry. One may run afoul of the law if he uses obscene language; but obscenity may not be put beyond the pale of debate. A man who bears arms against his government or who takes any preparatory measure towards that end can be punished; but revolution as a subject of discourse may not be outlawed any more than a defense, criticism, or advocacy of any political, philosophical, or religious creed. Bigamy may be outlawed; but the discussion of it, even its defense as a religious custom, may not be made illegal.

Certainly so far as questions of public import are concerned, Jefferson would permit full and free debate. He would allow more than debate; he would allow advocacy. Ideas are, of course, dangerous—the most dangerous forces

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in the world. And advocacy of an idea may be an incitement too powerful for any resistance. Every speech is indeed an incitement—sometimes an incitement to action, sometimes to meditation. Civilized man has known as much from the beginning. Jefferson, one of the foremost advocates the West has produced, knew as much from his own experience. Jefferson also knew that dangerous as advocacy and the excitement of ideas were, there was even greater danger in suppression. A government that enters upon a program of suppression may have its views of the public good in mind. But what is good for the government may be anathema to the people.

Henry VIII banned the reading of the Bible in church. He decreed that the common people should not read the New Testament in English. Why? The Bible contains strong ideas of liberty, ideas that might well make the common folk restless.

The monasteries of Tibet have long feared education of the masses, more than invasion from the east by China. The strength of China might wane and the invaders be driven from the land. But once the masses could read and write they would be likely to acquire notions of social justice that would imperil the authority of the monasteries.

Jefferson refused to give the powers-that-be such authority over the citizens. If the doctrine of "consent of the governed" was to be real, the people had to have full opportunity to learn. Freedom to learn is, indeed, the most important product of freedom of speech.

One of the most profound statements in American literature of the place of freedom of speech in our scheme of things was made by Dr. Alexander Meiklejohn, formerly President of Amherst College, in *What Does The First Amendment Mean?* 20 U. of Chi. L. Rev. 461. He said in summary:

"The Constitution of the United States, as it was adopted and as it now stands, does not give equal status

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to the duty of self-preservation and the duty of maintaining Political Freedom. On the contrary, our 'experiment' in self-government makes that freedom an absolute, while self-preservation is a conditional and relative consequence of it. It expresses the decision of the American people to establish and maintain freedom, and then watch what happens. And that decision is founded, not in idle dreaming, but in sober thinking and bitter experience. Underlying it is the strong conviction that, whatever may be the balance of immediate gains and losses, the progress of political freedom gives better assurance of national security than does any program of political repression and enslavement. And thus far in our history, that conviction has been justified both by the consequences of our disloyalties to the program and by those of our loyalties to it. Our only serious danger today is that of losing faith—of abandoning, through lack of nerve, the most novel, the most significant political principle which history records." *Id.*, 479.

The United States Supreme Court has not gone as far as Dr. Meiklejohn proposed. It has allowed the States and Congress to make some inroads on free speech.

One group of cases arose out of attempts by some persons during the First World War to discourage participation in the war effort—for example, by seeking to dissuade young men from serving in the Armed Forces. These activities led to several convictions, based on espionage legislation, which were upheld by the Court in a series of celebrated cases. See *Schenck* v. *United States*, 249 U. S. 47; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Abrams* v. *United States*, 250 U. S. 616; *Schaefer* v. *United States*, 251 U. S. 466; and *Pierce* v. *United States*, 252 U. S. 239. The Court's attitude in these cases was explained by Justice Holmes in the *Schenck* case:

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort

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that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*, 52.

Gitlow v. *New York*, 268 U. S. 652, was a state prosecution under a New York statute, making it a crime to advocate the "necessity or propriety of overthrowing or overturning organized government by force or violence." The defendants were proponents of the Communist program, urging mass industrial strikes and revolutionary mass action for the annihilation of the parliamentary state. Their manifesto concluded in these words, "The proletarian revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" The Court held that the language was "direct incitement," not the expression of "philosophical abstraction" (*Id.*, 665); and that one of the first rights of government was the "right of self preservation" (*Id.*, 668) to promote which it could outlaw all such utterances. The convictions were affirmed.

Whitney v. *California*, 274 U. S. 357, is in the same vein. California enacted a criminal syndicalism law which made a crime out of advocacy of terrorism as a political instrument. Defendant was a member of a branch of the Communist Party that espoused these tactics at a party convention.

Then came *Dennis* v. *United States*, 341 U. S. 494, involving convictions under a federal statute of the leading Communists in the United States. Congress passed a law, making it a crime to advocate or teach the desirability of overthrowing the Government of the United States by force or violence. 54 Stat. 671. The evidence showed the use of classical Communist literature to spread the Communist creed of revolution and the overthrow of existing governments. No overt acts of terror or sabotage were charged. These convictions also were sustained by a divided Court.

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In *Beauharnais* v. *Illinois*, 343 U. S. 250, a divided Court upheld an Illinois statute which prohibited the distribution of a publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." * The petitioner had been convicted for exhibiting leaflets contain-

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*In *Das* v. *Assam*, 41 A. I. R. 193, the High Court of Assam struck down a forfeiture order. The order was based upon a statute providing that the State Government might, on the certificate of the Advocate General or principal law officer of the State, or the Attorney General of India that any issue of a book or newspaper contained objectionable matter, declare all copies of the publication forfeited by notification in the official gazette, stating the grounds for the order. The Act defined objectionable matter as including any words or signs likely to incite "violence or sabotage for the purpose of overthrowing or undermining the Government" or "promote feelings of enmity or hatred between different sections of the people of India." The court pointed out that the requirement of a certificate from the Advocate General or principal law officer had not been complied with, so that the order was void on that ground.

The court then went on to hold that the booklet in question did not come within the category of objectionable matter under the Act. The booklet contained a criticism of capitalism and urged adoption of the socialist type of society. The work contained such passages as: "The first thing that is needed is the steadfast determination that we shall bring about socialism right now. Without that will, without that effort, the country will not itself turn socialist. No social revolution breaks out itself . . . ." Another passage declared: "The Indian Revolution will not await idly the move for the world revolution; rather the Indian revolution will be a prelude to world revolution."

The court stated: "It is true that the author advocates revolution in almost all spheres of political life, but that does not necessarily imply that the revolution, of which he is thinking, must be a revolution brought about by violence . . . . A party may even criticise the machinery of the State, may suggest that the old State machine is bound by thousands of threads to the bourgeois and permeated through and through with routine and inertia and, therefore, that machine has to be destroyed and replaced by a new one. This need

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ing a petition calling on local officials to halt alleged encroachments by members of the Negro race. In upholding the statute as thus applied, the majority of a sharply divided Court stated that it was analogous to laws prohibiting libel of individuals, and that it "would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented." *Id.*, 261. A dissenting opinion pointed out the danger of upholding such a serious inroad upon the domain of free discourse: "Debate and argument even in the courtroom are not always calm and dispassionate. Emotions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man. Hotheads blow off and release destructive energy in the process. They shout

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not necessarily lead to the inference that the author advocates violent revolution." *Id.*, 198–199.

The same statutory provision was involved in *Vadilal* v. *Bombay*, 41 A. I. R. 508, decided by the High Court of Bombay. The court held that the forfeiture power was not an unreasonable restraint on freedom of expression because of the requirement of the Advocate General's certificate and the power of the party affected to seek redress in the High Court if his rights were infringed.

Chand v. *State*, 41 A. I. R. 19, decided by the Ajmer J. C.'s Court, involved a statutory provision that upon complaint and inquiry, a Sessions Judge who was satisfied that a press published any newspaper or book containing objectionable matter might direct the keeper of the press to deposit security. The provision on objectionable matter covered any words or signs likely to promote enmity between different sections of the people of India, and on this basis security was required from the publisher of a newspaper which contained an article pointing out that the Hindus had not taken kindly to inter-communal marriages with Muslims, and described certain action taken in that connection. It also referred to possible kidnappings by Hindus in retaliation. The court held that this was properly held to be "objectionable matter" under the Act and the Act itself did not infringe Article 19.

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and rave, exaggerating weaknesses, magnifying error, viewing with alarm. So it has been from the beginning; and so it will be throughout time. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of Beauharnais may be. It is true that this is only one decision which may later be distinguished or confined to narrow limits. But it represents a philosophy at war with the First Amendment—a constitutional interpretation which puts free speech under the legislative thumb." *Id.*, 286–287.

Each of the cases I have reviewed involved laws abridging freedom of speech to some degree. They were not in the classic field of libel, slander, and blasphemy. Each of these utterances that was punished touched on a lively subject of public interest, subjects on which the people, as well as the judges, had deep feelings. The Court, to sustain the convictions, had to put a gloss on the First Amendment. It was done in an opinion by Justice Holmes. Writing for a unanimous Court in *Schenck* v. *United States*, 249 U. S. 47, he said, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.*, 52.

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There is the view that the issue of clear and present danger is for the jury and ultimately a question of law for the appellate court. That was the opinion of Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, ~~376–377.~~ 379.

Lately, the Court held that question to be solely one of law for the Court. Such was the ruling in *Dennis* v. *United States*, 341 U. S. 494, 512–515.

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The late Chief Justice Vinson spoke for a majority of the Court in *Dennis* v. *United States*, when he ruled that a case of clear and present danger had been established:

"The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score." *Id.*, 510–511.

Since Congress could prevent the overthrow itself or punish those who undertook it, Congress could punish the advocacy, if there were present the intent to have the plan succeed and if the objective was part of a political action program. The late Chief Justice went on to say:

"Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or powers of the revolutionists, is a sufficient evil for Congress to prevent. The damage which

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As Prof. Earl Latham of Amherst College has said:

"The Dennis Case, however desirable the result, leaves the books a statute that should have fallen, by the original ndards of the doctrine of clear and present danger. For on its e, it makes mere advocacy of violent subversion a crime. And tever the clear and present danger doctrine may have meant other respects, in this one respect it was certainly unambiguous: e advocacy, without more, could not constitute a clear and ent danger." The Supreme Court and The Supreme People, 16 rnal of Politics, 207, 232-233.

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such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt. In the instant case the trial judge charged the jury that they could not convict unless they found that petitioners intended to overthrow the Government 'as speedily as circumstances would permit.' This does not mean, and could not properly mean, that they would not strike until there was certainty of success. What was meant was that the revolutionists would strike when they thought the time was ripe. We must therefore reject the contention that success or probability of success is the criterion." *Id.*, 509–510.

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I have said enough to indicate how far the Court has departed from what many conceived the purpose of the First Amendment to have been. The decisions of the Court involving freedom of speech have the flavor of due process, not the absoluteness of the prohibition in the First Amendment. The construction adopted by the Court has left the legislature with considerable leeway to outlaw utterances, not only where defamation and sacrilege are concerned but where large public issues are involved. The gloss which has been placed on the First Amendment does in part what the constitution-makers did when Article 19 (2) was written into India's Constitution.*

While Article 19 (1)(a) provides that "All citizens shall have the right to freedom of speech and expression," Article 19 (2) as amended in 1951, states:

"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the

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*For a detailed discussion of the Indian cases in this area, see Fundamental Rights, by K. Venkoba Rao (1952), pp. 99–114. "The heresies of today are the orthodoxies of tomorrow and the world gains nothing from a refusal to entertain the possibility that a new idea may be true." *Id.*, 71.

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said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

Prior to the 1951 Amendment to Article 19, the Supreme Court of India had held that, unless a law restricting freedom of speech and expression were directed solely against the undermining of the security of the State or its overthrow, it could not be held a reasonable restriction though it sought to impose a restraint for the maintenance of public order. *Thappar* v. *Madras*, 13 Sup. Ct. Jour. 418. In that case Justice Patanjali Sastri wrote for the Court: ". . . very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realization that freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible." *Id.*, 423–424. At the same time, the Court held that the imposition of pre-censorship on a journal was a restriction on the liberty of the press which is an essential part of the freedom of speech and expression guaranteed by Article 19 (1)(a). *Bhushan* v. *Delhi*, 13 Sup. Ct. Jour. 425.

In 1951, the scope of Article 19 (2), which qualifies and restricts Article 19 (1)(a), was broadened, as I have noted. Whether those decisions continue to have validity after the 1951 Amendment is not clear. To date, however, the Indian courts have leaned to the side of tolerance for free speech.

The need to protect free speech was emphasized by the High Court of Patna in *Soren* v. *State*, 41 A. I. R. 254, where it was held that certain speeches which allegedly attempted to bring the Government into hatred or contempt, invite disaffection toward the Government of India, and stir up class hatred did not in fact do so and

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were, therefore, not within the ambit of the applicable statutory prohibitions. Justice Das pointed out the task before the court as follows:

". . . the speeches made must be considered as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong expression used here and there; in other words, an attempt should be made to gather the general effect of the speeches as a whole. . . . the intention of the speaker in using the words complained of is relevant; but the intention must be gathered from the language used, as also from the whole of the circumstances in which the speeches were made including the audience to whom they were addressed." In indicating the attitude with which this task must be approached, he explained:

". . . In a democratic country such criticisms are to some extent unavoidable, they are made for the purpose of enlisting popular support, and in considering the effect of such criticisms no serious notice ought to be taken of crude, blundering attempts or of rhetorical exaggeration by which nobody is likely to be impressed. . . . with the change of times, the effect of criticisms also changes; what was damaging contempt or hatred of a bureaucratic Government is not so of a popular Government—a Government which can neither afford to be hyper-sensitive, nor impervious, to criticism." *Id.*, 260–261.

In *Bihar* v. *Devi*, 15 Sup. Ct. Jour. 465, the Supreme Court held that while a statute could validly restrict expressions inciting the commission of violent crimes, the document in question did not fall within the statutory prohibition, as it merely consisted of "empty slogans." Justice Mahajan wrote: "Writings of this character at the present moment and in the present background of our country neither excite nor have the tendency to excite any person from among the class which is likely to read a pamphlet of this nature.

". . . the writing has to be considered as a whole and in a fair and free and liberal spirit. . . ." *Id.*, 469–470.

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Freedom to learn is the great aim of freedom of expression. It is, indeed, one of the great values in a free society. It was brought clearly to focus by *Meyer* v. *Nebraska*, 262 U. S. 390, where a local law made it a crime to teach any subject ~~in any school~~ in any language other than English. One teacher who taught the subject of reading in the German language was prosecuted and convicted. The Supreme Court reversed the judgment, saying the law conflicted with the rights of teachers to teach, of students to learn, and of parents to control the education of their children.

Bombay v. *Bombay Education Society*, 17 Sup. Ct. Jour. 678, is in the same tradition. A State barred from public schools, where the English language was used as a medium of instruction, any pupil other than Anglo-Indians or citizens of non-Asian descent. The purpose of the law was to promote the advancement of the national language by denying admission to schools where English was used by all pupils whose mother tongue was not English. Article 29 (2) of the Constitution provided, however, that "No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." ~~The law was held to infringe this fundamental right. The Court held that the law was not saved by Article 30 (1) which~~ states, "All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." The purpose of promoting the national tongue was laudable but the means employed were unconstitutional.

Freedom of speech is now preferred in the American system. It is preferred because it is secured against both state action and federal action. It is also preferred because the legislative branch is granted no powers to regulate it. As we have seen, not many fundamental rights secured by the American Bill of Rights enjoy that preference. Perhaps the most dramatic and important

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case that illustrates that preference is *Thomas* v. *Collins*, 323 U. S. 516.

Texas required a labor organizer to get a license to address a public meeting of workers. The State got an injunction in an *ex parte* proceeding against Thomas, a labor organizer, enjoining him from speaking without the license. Thomas defied the law and the injunction and addressed a meeting. In the speech he defended his right to speak without a license, espoused the union cause, and solicited membership. Thomas was convicted for his offense and brought the case to the Supreme Court. His right to proceed under the protection of the First Amendment and irrespective of the demands of the state law was sustained by the Court. The late Justice Wiley Rutledge, writing for the majority, pointed out that a State could police and safeguard the solicitation of funds from workers but could not license a right guaranteed by the First Amendment. The admixture of those purposes presented a question of great delicacy. But the majority resolved it by protecting the right of free speech. What Justice Rutledge wrote was in the great liberal tradition:

"These rights of assembly and discussion are protected by the First Amendment. Whatever would restrict them, without sufficient occasion, would infringe its safeguards. The occasion was clearly protected. The speech was an essential part of the occasion, unless all meaning and purpose were to be taken from it. And the invitations, both general and particular, were parts of the speech, inseparable incidents of the occasion and of all that was said or done.

"That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word. A speaker in such circumstances could avoid the words 'solicit,' 'invite,' 'join.' It would be impossible to avoid the idea." *Id.*, 534. ~~And see~~ *Poulos* v. *New Hampshire*, 345 U. S. 395.

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Freedom of speech in America is not reserved for a select few. It extends to labor* as well as capital, to farmers as well as to merchants, to socialists and communists as well as to republicans and democrats, to Catholics as well as to Protestants.

One of the basic protections of free speech is freedom of assembly, also guaranteed by the First Amendment. The sanctity of that right is shown by *De Jonge* v. *Oregon*, 299 U. S. 353, discussed in an earlier Lecture. Freedom of assembly and freedom of speech, indeed, go hand in hand. Abuse of freedom of assembly, as for example inciting a riot, can be curtailed. But the right itself cannot be. When the line of unlawful conduct has been crossed and the right of assembly abused is a question on which judges may closely divide, as they did in the recent case of *Feiner* v. *New York*, 340 U. S. 315. But the right peaceably to assembly for public discussion and debate, for political action, and for the run of community activities is firmly entrenched in America.

These days free speech includes more than talk to a crowd from a platform. It includes the movies, radio, and television as well. It also includes the loud-speaker,

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*Picketing has sometimes been called the laboring man's method of free speech. And to a degree it is. But picketing is more than speech; it is physical conduct on streets or at factory doors. Like a procession or a parade, it presents special problems which speech, and speech alone, does not involve. The subject is too involved to present in these Lectures. Perhaps the leading American case is *Thornhill* v. *Alabama*, 310 U. S. 88, which brought picketing under the aegis of the First and Fourteenth Amendments. But the cases which followed showed how pervasively picketing can be regulated, especially on those phases that involve physical conduct, not merely the dissemination of ideas. See especially *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287; *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722; *Cafeteria Union* v. *Angelos*, 320 U. S. 293; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Hughes* v. *Superior Court*, 339 U. S. 460; *Building Service Union* v. *Gazzam*, 339 U. S. 532; *Teamsters Union* v. *Hanke*, 339 U. S. 470; *Electrical Workers* v. *Labor Board*, 341 U. S. 694; *Plumbers Union* v. *Graham*, 345 U. S. 192.

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which has become virtually indispensable to those who address large audiences and especially to those who speak frequently, as do candidates for public office. The problem of the loud-speaker was recently before the Court.

Saia v. *New York*, 334 U. S. 558, involved a local ordinance which forbade the use of sound amplification devices without the permission of the chief of police. A minister of a religious sect, the Jehovah's Witnesses, used a sound amplifier in a public park to give speeches on religious subjects. He had no permit and was convicted under the ordinance. The United States Supreme Court held that the ordinance was unconstitutional as a previous restraint on free speech in violation of the First Amendment (as incorporated in the Fourteenth). The Court pointed out that the ordinance was not a mere regulatory measure, but a restraint without adequate standards for the exercise of the power of the police chief. The Court explained:

"The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. . . .

"Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice." *Id.*, 562. Cf. *Kovacs* v. *Cooper*, 336 U. S. 77.

The actual restraints placed by American law on free speech have not been numerous. The instances cited are

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few in number and slight in terms of total impact on public and private discourse in the United States. One has only to see the American movies, listen to the American radio, watch American television, attend our public meetings, and read American newspapers and magazines to learn that all shades and diversities of opinion are reflected, that all schools of thought can and do express themselves. The opposition is not suppressed. There are few taboo subjects.

The great postulate of our democracy is confidence in the common sense of the people and in their maturity of judgment, even on great issues—once they know the facts.

This is the tradition which India is also building. Ignorance and illiteracy are, of course, not synonymous; even illiterate masses can cast their ballots with intelligence, once they are informed. No more brilliant demonstration of that thesis was ever made in the history of the world than in India's general elections of 1951. Once the channels for communication are kept open, ideas will win on their merits. If these channels are not closed, the freedom to learn will flourish.

That is the Indian ideal as well as the ideal of the United States. Both are in irreconcilable conflict with the theory which Soviet Communism espouses. For Vyshinsky wrote in *The Law of the Soviet State* "In our state, naturally, there is and can be no place for freedom of speech, press, and so on, for the foes of socialism." *Id.*, 617.

What the Supreme Court of India held in *Singh* v. *Pepsu*, 41 A. I. R. 276, is at war with the Soviet philosophy. In that case, people held in preventive detention under Article 22 of the Constitution (discussed in the following Lecture) filed a petition for a writ of *habeas corpus*. They had distributed pamphlets which made serious accusations of improper conduct by a high judicial officer. That was the reason for their detention. In ordering their release the Supreme Court, speaking through Chief Justice (then Justice) Mukherjea, said:

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". . . the propriety or reasonableness of the satisfaction of the Central or the State Government upon which an order for detention . . . is based, cannot be raised in this court and we cannot be invited to undertake an investigation into sufficiency of the matters upon which satisfaction purports to be grounded. We can, however, examine the grounds disclosed by the Government to see if they are relevant to the object which the legislation has in view, namely, the prevention of objects prejudicial to the defence of India or to the security of State and maintenance of law and order therein . . . we are definitely of opinion that the publication or distribution of these pamphlets could not have any rational connection with the maintenance of law and order in the State or prevention of acts leading to disorder or disturbance of public tranquillity . . . . Whatever other remedies that might be open to the aggrieved party or to the Government to prevent such scurrilous attack upon the head of the judiciary in the State, we do not think that the provisions of the Preventive Detention Act could be made use of for that purpose. The utmost that can be said is that the allegations in the pamphlets are calculated to undermine the confidence of the people in the proper administration of justice in the State. But it is too remote a thing to say, therefore, that the security of the State or the maintenance of law and order in it would be endangered thereby." *Id.*, 277–278.*

B. *Freedom of the Press.*

Freedom of the press is part of the freedom of expression guaranteed both in India and in the United States. Some of the American materials already considered in the preceding part of this Lecture involved the printed word, not oral utterances. Freedom of the press, like

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*Cf. *Singh* v. *Delhi*, 14 Sup. Ct. Jour. 374, where the Supreme Court of India refused to hold preventive detention invalid, because it was based on the making of speeches prejudicial to public order.

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freedom of speech, has many values to the editor or speaker, to the reader or listener, to society as a whole. Greatest of these, as I have said, is freedom to learn. The book, the speech, the pamphlet open new horizons for people. They are essential for the informed and intelligent electorate, as well as for the scientist, the philosopher, or the administrator.

The classic statement came from John Milton in the famed *Areopagitica*, a book which Oliver Cromwell and his Parliament condemned in 1644. Milton wrote:

". . . books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; ~~may~~ they do preserve as in a vial the purest efficacy and extraction of that living intellect that bred them. I know they are as lively, and as vigorously productive, as those fabulous dragons' teeth; and being sown up and down, may chance to spring up armed men. And yet on the other hand unless wariness be used, as good almost kill a man as kill a good book; who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself, kills the image of God, as it were in the eye. Many a man lives a burden to the earth; but a good book is the precious life-blood of a master spirit, imbalmed and treasured up on purpose to a life beyond life. It is true, no age can restore a life, whereof perhaps there is no great loss; and revolutions of ages do not oft recover the loss of a rejected truth, for the want of which whole nations fare the worse. We should be wary therefore what persecution we raise against the living labors of public men, how we spill that seasoned life of man preserved and stored up in books; since we see a kind of homicide may be thus committed, sometimes a martyrdom, and if it extend to the whole impression, a kind of massacre, whereof the execution ends not in the slaying of an elemental life, but strikes at that ethereal and fifth essence, the breath of reason itself, slays an immortality rather than a life."

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Licensing of the press has appeared in one form or another throughout recorded history. Ideas are dangerous; and the traffic in them has been the concern of all dictators. Political or religious dissenters are, indeed, the plague of every totalitarian regime.

Only the other day, Gabriel Arias Salgado, Minister of Information in the Spanish Government, stated:

"One of the worst evils of a democratic state is public opinion." Public opinion, he said, "must be subject to the vigilance of authority."

"Those who still clamor for so-called freedom of the press demonstrate that they are very backward people."

Licensing of the press continued in England until 1694.

Censorship has had a long history in the western world. Book banning is as old as books. The Roman Emperor Caligula suppressed the *Odyssey* in 35 A. D. because it contained ideas of freedom dangerous to Rome. Tyndale's translation of the *New Testament* was suppressed in England in 1525. Martin Luther's translation of the *Bible* was burned in Germany in 1624. Michael Servetus and his book, *The Restoration of Christianity*, were burned together at Geneva in 1553. Galileo's writings that the earth was round were destroyed as heretical in 1642. *Uncle Tom's Cabin* by Harriett Beecher Stowe, attacking the institution of slavery in the United States, was banned by Russia in 1852. Soviet Russia banned *My Life and Work* by Henry Ford, the pioneer American in the motor vehicle field.

The list is long; the examples are almost legion. There are still censors in most lands. Sometimes religious groups put books on their proscribed list as a means of advertising to their members literature that should not be read.

At other times, private groups will attempt to serve as unofficial censors of books and magazines, bringing pressure to bear in order to prevent the dissemination of literature that is not to their taste. The way American courts deal with these self-appointed censors, who seek to

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prevent dealers from handling books and magazines they do not like, is illustrated by *American Mercury, Inc.* v. *Chase*, 13 F. 2d 224, decided by the Federal District Court of Massachusetts in 1926, where Judge Morton stated:

". . . The defendants have the right of every citizen to come to the courts with complaints of crime; but they have no right to impose their opinions on the book and magazine trade by threats of prosecution if their views are not accepted. . . . The facts that the defendants are actuated by no commercial motive and by no desire to injure the plaintiff do not enlarge their rights in this respect . . . .

"Of course, the distributors have the right to take advice as to whether publications which they sell violate the law, and to act on such advice if they believe it to be sound. The defendants have the right to express their views as to the propriety or legality of a publication. But the defendants have not the right to enforce their views by organized threats, either open or covert, to the distributing trade to prosecute persons who disagree with them." *Id.*, 225.

Most States in America have laws regulating obscene and salacious literature, making it a crime to publish or distribute it. See Hale, *Law of the Press* (1948), p. 466 *et seq.*

A federal law prohibits importing obscene books into the United States. 19 U. S. C. § 1305. Another federal law bans the use of the mails or agencies of interstate commerce to distribute such literature. 18 U. S. C. §§ 1461, 1462.

The English test of obscenity, dating from 1868, was "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360, 371.* In American federal law a book is obscene if the

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*This test was adopted by the High Court of Mysore in *Ramamurthy* v. *Mysore*, 41 A. I. R. 164.

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work as a whole tends to stir the sex impulses or to lead to sexually impure and lustful thoughts.*

The latter view, giving a liberal construction to the word "obscene," grew out of litigation over *Ulysses*, written by James Joyce. The book was banned from import on the grounds of obscenity. *United States* v. *Ulysses*, 72 F. 2d 705, decided by the Court of Appeals for the Second Circuit in 1934, sustained Judge John M. Woolsey of the lower court, who had lifted the ban on the book. Woolsey wrote:

"I am quite aware that owing to some of its scenes 'Ulysses' is a rather strong draught to ask some sensitive, though normal, persons to take. But my considered opinion, after long reflection, is that, whilst in many places the effect of 'Ulysses' on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac." 5 F. Supp. 183, 185.

On the other extreme are books where obscene words ~~are not used~~ to give meaning or color to the whole scene but to promote lust or portray filth for its own sake.

Beginning in 1872, Congress has authorized the postal officials to prevent the delivery of literature or letters used in an enterprise to obtain money by fraud. That power of Congress over the mails is well established (see *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Donaldson* v. *Read Magazine*, 333 U. S. 178), against the claim that such regulation violates the guaranty of freedom of the press contained in the First Amendment.

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*The Court of Appeals said in the *Ulysses* case:

". . . we believe that the proper test of whether a given book is obscene is its dominant effect. In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content." 72 F. 2d, at 708.

That rule is in general followed by the state courts. See *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 344–346; *Bantam Books* v. *Melko*, 25 N. J. Super. 292, 14 N. J. Rep. 524.

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But the power to bar material from the mails, whether it be on the grounds of fraud or obscenity, is a potent one, easy of abuse. Hence orders entered under the postal laws are reviewable by the courts. And the courts have been alert to see that no form of censorship enters the field, openly or under disguise.

Perhaps the leading case is *Hannegan* v. *Esquire*, 327 U. S. 146, which involved the denial of the special rates of second class mail to a magazine, because it seemed to the Postmaster General systematically to contain writings and pictures which, though not obscene, were "indecent, vulgar, and risque." He ruled that the special rate afforded magazines was available only to those which contributed to "the public good and the public welfare." *Id.*, 150. The Supreme Court did not let that order stand. In ruling that it was beyond the power of the Postmaster General to deny the special rates to a magazine on that ground, the Court wrote with special reference to the guaranty of freedom of press contained in the First Amendment:

". . . a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates." *Id.*, 158.

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Censorship is, indeed, alien to the American system. The classic case is *Near* v. *Minnesota*, 283 U. S. 697, decided in 1931. Minnesota condemned as a nuisance, and allowed to be enjoined, any "malicious, scandalous and defamatory" newspaper or magazine. A paper called *The Saturday Press* was condemned under this statute as a nuisance, and its owners and publishers were perpetually enjoined from publishing it. The Supreme Court set the injunction aside, as being an unconstitutional restraint on freedom of the press. The law laid a previous restraint on publication, a device used in colonial days to suppress criticism and stifle opposition to those in power. The press in America may be sued—civilly and criminally—for wrongs inflicted or crimes committed. But it may not be suppressed because it is irresponsible or reckless or imprudent. Chief Justice Hughes wrote:

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Id.*, 719–720.

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The Indian courts have also been faced with the problem of prior restraints. The provision of free speech in Article 19 of the Constitution of India has been held to include the guarantee of a free press. See *In re Venugopal*, 41 A. I. R. 901, decided by the High Court of Madras. Like the guarantee of free speech, the freedom of the press is also subject to the limitations of Article 19 (2).

But while freedom of the press in India is not unlimited, attempts at prior restraints have been strictly tested. In *Shanker* v. *State*, 41 A. I. R. 562, the High Court of Allahabad held that an Act which required a permit to publish any newspaper and penalized publication without such a permit was not a reasonable restraint within the meaning of Article 19 (2). Justice Desai pointed out:

"S. 15 confers absolute discretion to the District Magistrate to grant or refuse permit to anyone. There is absolutely nothing to guide him in his discretion. Not only are any standards laid down but also one cannot imagine any. . . .

" 'The censor is set adrift upon a boundless sea.' " *Id.*, 568.

In *In re Venugopal*, 41 A. I. R. 901, the High Court of Madras struck down certain restrictions pertaining to the publication of information relating to horseracing. The court stated:

"The idea underlying this right of the Government to permit or not to permit the publication of news regarding horse-races and acceptances in connection therewith is nothing different from that which is involved in the right of pre-censorship of news by the executive authority. . . . pre-censorship is not consistent with the exercise of the fundamental right to freedom of speech and expression guaranteed under the Constitution and . . . where the reasonableness of restriction is made to depend upon what is to be permitted or not by the executive authority, it will amount to a negation of the right to freedom of speech and expression." *Id.*, 910.

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The conventional press of modern times is the newspaper, the periodical, and the book. Science, however, has produced other methods and media of communication which are just as basic and probably as enduring. The radio is one; the moving picture is another; television is a third. These media are used partly for education, primarily for entertainment.

The American conception of the press has never been a limited one. Back in 1774, the Continental Congress invited the inhabitants of Quebec to join the Americans in their struggle against British imperialism, and sent the famous Quebec Letter. That letter listed the rights which the American Colonists held dear; and it stated among other things:

"The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs."

The "advancement of truth, science, morality, and arts in general" covers a broad sweep. It was, however, decided in 1915 that movies were not within the guaranty of the freedom of the press. *Mutual Film Corp.* v. *Industrial Commission*, 236 U. S. 230. But the Court changed its position in 1952 and held in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, that movies ~~were~~ are under the aegis of the First Amendment. "They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.*, 501.

That case involved denial of a license by the New York authorities to exhibit the moving picture, *The Miracle*, on the ground that it was sacrilegious. A later case involved

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denial of a license by Ohio authorities to exhibit a motion picture called "M" under a statute which provided that the state board should approve only such films as it regarded as of a moral, educational or amusing and harmless character. *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587.

In each of these cases the Court held that the restraint imposed was censorship forbidden by the First Amendment. The Court did not go so far as to hold that all censorship of movies was outlawed. It confined itself to narrower grounds, concerning the adequacy of the standards employed in those instances. Movies may, of course, rouse passions *en masse* more quickly than other media. They present specialized problems. But they have First Amendment protection in America; and they deserve it because of their high service in the communication of ideas.*

Censorship of the press was only one historic method of suppression. Taxation of the press was another. Of course, a publisher can be required to pay the same kind of taxes that all citizens pay as a part of the price of the

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*Cf. *Seshadri* v. *District Magistrate*, 41 A. I. R. 747, where the Supreme Court of India held that Article 19 (1) (g) prohibited a requirement that a theatre operator must, as a condition of his license, exhibit certain films approved by the government. The Court said, "The exhibition of a film generally takes 2 hours and a quarter. Now if there is nothing to guide the discretion of the Government it is open to it to require the licensee to show approved films of such greath length as may exhaust the whole of the time or the major portion of it intended for each performance. The fact that the length of the time for which the approved films may be shown is also unspecified leads to the same conclusion, in other words, the Government may compel a licensee to exhibit an approved film, say for an hour and a half or even 2 hours. As the condition stands, there can be no doubt that there is no principle to guide the licensing authority and a condition such as the above may lead to the loss or total extinction of the business itself. A condition couched in such wide language is bound to operate harshly upon the cinema business and cannot be regarded as a reasonable restriction. It savours more of the nature of an imposition than a restriction." *Id.*, 749.

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civilization they enjoy. But the taxes that have an invidious incidence are those which historically were known in America as "taxes on knowledge." They were rampant in England during the Eighteenth Century and generated powerful opposition. The stamp tax laid on the cheaper papers that reached the masses had the effect of stifling their circulation or greatly curtailing it.

That kind of a tax is unconstitutional in the United States, as *Grosjean* v. *American Press Co.*, 297 U. S. 233, held. That case involved a tax of 2 per cent on the gross receipts derived from advertisements carried in a newspaper when, and only when, the newspaper had a circulation of more than 20,000 copies per week. The law was aimed at a powerful group that was opposed to the regime in control of Louisiana in 1934. Justice Sutherland, writing for the Court, said,

". . . The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Id.*, 250.

In most respects the press in America enjoys the same freedom and is subject to the same restraints as the press in Australia, England, and India. There are differences, but most of them are minor. One major difference concerns contempt by publication.

Toledo Newspaper Co. v. *United States*, 247 U. S. 402, decided in 1918, was a decision which I believe would today be more congenial to Australia, England, and India than to the United States. A suit was pending in a federal district court concerning the rights of a streetcar company against the city which granted its franchise. While the action was pending, a newspaper commented on the

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issues, taking the side of the city. The judge cited the paper for contempt and imposed a fine. That judgment was affirmed by the Supreme Court. The power to punish summarily for contempt was held to extend to those acts which have a "direct tendency to prevent and obstruct the discharge of judicial duty. . . ." *Id.*, 419.

The power of federal courts to punish for contempt by summary action had been confined by Congress to "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice." *

In all other cases a trial by jury was granted an accused. Moreover, it is so contrary to the Anglo-American tradition for one person to be the accuser and the judge that a powerful argument was made for narrowly restricting this summary power.

Justice Holmes and Justice Brandeis were moved by these considerations to dissent in the *Toledo Newspaper Co.* case. And by 1941 their dissenting view had been adopted by the Court. In that year *Nye* v. *United*

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*The statute at the time in question read:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." 36 Stat. 1163.

It has now been slightly rephrased in 18 U. S. C. § 401 as follows:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

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States, 313 U. S. 33, overruled the *Toledo Newspaper Co.* case. The *Nye* case involved unethical means used to get a litigant to discontinue his case. The acts took place far from the courthouse and were in no way related to the judicial proceedings. The Court ruled that the statute, allowing federal judges to punish summarily for contempt only those acts of "misbehavior" which were committed "in their presence, or so near thereto as to obstruct the administration of justice," was to be construed narrowly, that the terms used were geographical, that the fact that the acts obstructed the administration of justice was not enough to bring into play the summary contempt powers. Acts not within those terms might be punished. But if so, they would follow the usual pattern of criminal procedure: indictment, jury trial, and trial before an impartial, disinterested judge.

The decision in the *Nye* case was shortly given expanded scope in *Bridges* v. *California*, 314 U. S. 252. The *Nye* case was a *federal* decision under the Act of Congress which I have mentioned. The *Bridges* case involved contempt because of comments on litigation pending before the *state* courts of California. The power asserted was the so-called inherent power of courts to punish for contempt. The Court, speaking through Justice Black, said:

"The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.*, 270–271.

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The maintenance of the dignity of the Court was not, in other words, sufficient basis for use of the summary method of contempt. Justice Black pointed out how unbridled newspaper comment might seriously infect the trial. He said:

"The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." *Id.*, 271.

The Court, after reviewing the issues of the litigation and the comments that had brought the contempt power into play, concluded that there was nothing written or done to obstruct the administration of justice.

The *Bridges* case has been followed in other cases from state courts. See *Pennekamp* v. *Florida*, 328 U. S. 331, and *Craig* v. *Harney*, 331 U. S. 367. In the *Craig* case, the Court said,

"The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Id.*, 376.

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These rulings curb the power of summary punishment very drastically, saving for the ordinary processes of the criminal law all other contempts by publication.

These decisions are distinctly American. They might not fit the environment of other lands, where judges are more aloof from the community and the bar than they are in America, where the judiciary is removed from the rough-and-tumble of life, where no judge ever runs for public office. In America "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig* v. *Harney*, 331 U. S. 367, 376.

This does not mean that the press can dominate a trial or lash the judge without limit. On one side is the wide area of permissible public comment guaranteed by the First Amendment; on the other is the necessity of maintaining fair judicial administration. What newspaper comment crosses the line into the forbidden field is a matter on which judges commonly disagree. The test in America is a severe one. For as I have indicated, the weight of the Court is on the side of public comment and against the use by judges of the summary contempt power.

The Indian courts, too, have been concerned with contempt by publication. In *State* v. *Ahmed*, 41 A. I. R. 175, the High Court of Hyderabad stated:

"We may observe that the freedom of press under our Constitution is not higher than that of citizen, and that there is no privilege attaching to the profession of the press as distinguished from the members of the public. To whatever height the subject in general may go, so also may the journalist, and if an ordinary citizen may not transgress the law so must not the press. That the exercise of expression is subject to the reasonable restriction of the law of contempt, is borne out by Clause (2) of Article 19 of the Constitution.* It should be well to re-

*It should be noted that Article 19 (2) expressly qualifies free speech by the contempt power.

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member that the Judges by reasons of their office are precluded from entering into any controversy in the columns of the public press, nor can enter the arena and do battle upon equal terms in newspapers, as can be done by ordinary citizens." *Id.*, 178.

The primary considerations which should weigh with the court when it is called upon to deal with such contempt cases were stated by the Supreme Court of India in *Prakash* v. *Uttar Pradesh*, 41 A. I. R. 10, a case involving resolutions passed by a Bar Association which related to the conduct of certain judicial officers:

". . . the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties, would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. 'The path of criticism . . . is a public way. The wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice, or attempting to impair the administration of justice, they are immune.'

". . . when attacks or comments are made on a Judge or Judges, disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on the Judge and what amounts really to contempt of court. The fact that a statement is defamatory so far as the Judge is concerned does not necessarily make it a contempt." *Id.*, 13–14.

The strictness of the Indian law of contempt, as compared with the American, is illustrated by *Ghose* v. *Bose*, 16 Sup. Ct. Jour. 38, where a newspaper was held in contempt for criticising a judgment of the Supreme Court dealing with the rights of advocates of the Supreme Court to practice before the High Court. The article said:

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". . . to achieve a dubious or even a laudable purpose by straining the law is hardly edifying. Politics and policies have no place in the pure region of the law; and Courts of law would serve the country and the Constitution better by discarding all extraneous considerations and uncompromisingly observing divine detachment which is the glory of law and the guarantee of justice."

The Court said:

"No objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and *bona fide* criticism but had a clear tendency to affect the dignity and prestige of this Court. The article in question was thus a gross contempt of Court. It is obvious that if an impression is created in the minds of the public that the judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined. It was for this reason that the rule was issued against the respondents." *Id.*, 38–39. And see *Dixit* v. *Uttar Pradesh*, 41 A. I. R. 743. Cf. *Reddy* v. *Madras*, 15 Sup. Ct. Jour. 137, 141.

The basic problem in India, as in the United States, has been to reconcile the guaranty of a free press with the need to preserve fairness in the administration of justice. This was pointed out by the High Court of Orissa in *State* v. *Editors*, 41 A. I. R. 149, where the court stated:

"There is no doubt about the proposition that when a case is pending or imminent any matter published in a newspaper which has a tendency to prejudice one of the parties or to mobilise public opinion in favour of a rival party would amount to contempt. . . .

"Where a pending case in respect of which contempt is alleged to have been committed is a case of defamation and the person alleged to have been defamed is a politi-

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cian, other important questions also arise for consideration. Article 19 (1)(a) of the Constitution guarantees freedom of speech and the Press should have freedom to criticise the activities of public men belonging to one party or the other. Not infrequently a politician who does not want his public activities to be exposed may institute a criminal case of defamation in respect of an article appearing against him in a newspaper and then resort to the law of contempt for the purpose of gagging all hostile comments on his other public activities, while keeping the defamation case pending as long as possible. Hence, though any attempt of trial by the Press of a pending case should be sternly put down by enforcing the law of contempt, in appropriate cases the said law should not be so strained as to materially affect the freedom of speech of newspapers. A line has to be drawn between the law of contempt on the one hand and the freedom of speech of the newspapers on the other. Where an article is published with the 'intention' of prejudicing the fair trial of a pending case, there can be no hesitation in applying the law of contempt against the offending newspaper. But where such intention is absent and the Court is asked to infer that the article has a 'tendency to prejudice the fair trial of a pending case' many other considerations should also be carefully weighed." *Id.*, 159.

See also: *Legal Remembrancer* v. *Bhusan*, 41 A. I. R. (Pat.) 203; *Singh* v. *Singh*, 40 A. I. R. (All.) 342; *Bijoyananda* v. *Balakrushna*, 40 A. I. R. (Or.) 249. In reconciling these competing interests, the courts of India have, I believe, been somewhat stricter in requiring the press to avoid interference than have the courts in our own country. Indian law, as I read it, is close to the *Toledo Newspaper* case, now overruled and rejected in America.

Democracy requires an informed citizenry, and an important factor in keeping the citizens informed is a free press. Newspapers and magazines which are free to print

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the whole truth, even when it may prejudice the position of some vested interest, serve the cause of an enlightened public opinion. By presenting the "pros" and "cons" of the major issues of the day, they help keep public opinion in a healthy state of thoughtful ferment.

Books may serve as powerful agencies of social, economic, or political reform. They may enable us to gain a keener insight into our society and its problems.

The same is true of the newer media—radio, television, and motion pictures.

The Founding Fathers recognized these facts when they incorporated the guarantee of a free press into the First Amendment. Our Supreme Court has considered them as it has sought to carry out the mandate of that Amendment. Attempts to curtail freedom of the press have, in general, been struck down—whether those attempts have taken the form of outright censorship or of more subtle devices, such as a carefully calculated tax scheme.

Some members of the American bench and bar have felt that the press has been permitted to go too far in criticizing judges and judicial decisions. Judge Simon H. Rifkind stated in 1950:

"There is practically no restraint upon the character of the information and opinion which a newspaper can publish about a case before trial, while it is pending before a jury, or after it has been decided.

". . . time-honored procedure, forged through the generations to the single end that issues shall be impartially determined on relevant evidence alone, works fairly well in all cases but one—the celebrated cause. As soon as the *cause celebre* comes in, the judges and lawyers no longer enjoy a monopoly. They have a partner in the enterprise and that partner is the press. . . .

"We shall not find a remedy for the situation in contempt proceedings. In the clash of the constitutional principles of freedom of the press and due process, the point of the contempt weapon has been blunted."

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Judge Rifkind recognized the dangers of permitting a broad use of the contempt power in such cases:

"There is considerable to be said for the proposition that the minute you deny the verity of this claim to immunity, you must endow someone with the right to say what shall or shall not go into the press, and that means censorship. That means censorship even though the censors may be judges. Judges are men, not angels. While some would exercise the power of censorship with high regard for the true interests of the judicial process, others might exercise it to prevent perfectly proper criticism of their own administration of office." He suggested the following solution:

"I think we must resort to the voluntary remedy. A permanent body composed of members of the bench, bar and press should be organized to bring together the viewpoints of all concerned. I am confident that common ground would be found upon which all could stand, preserving to each the essentials for decent and orderly functioning. After all, the press and the courts are mutually interdependent. The press must have an uncoerced judiciary to maintain freedom of the press; and the judiciary requires an uncensored press to maintain an uncoerced judiciary. Only ignorance of each other's problems can keep such natural partners in conflict. With enlightenment may come resolution of the clash, or at least mitigation of its evils."

C. *Freedom of Religion.*

Gandhi once wrote:

"Any creed or dogma which coerces others into following one uniform practice is a religion only in name, for a religion worth the name does not admit of any coercion."

That is the American ideal embodied in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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This is the doctrine of separation of Church and State* which evolved after years of bloody experiences.

In America, we once had an established church. That was in the colonial period under the British, when the Anglican Church was the official, the preferred church. It was supported by taxation. Only its clergy could officiate at marriages and baptisms. The other religious sects were in existence and held their services. But they existed only as a matter of favor, as is true in certain Asian nations today.

In 1779, shortly after the Revolution, the Anglican Church was disestablished. But the constitutions which the new States adopted usually contained two provisions touching on this problem: (1) they provided that public taxes should go to the support of churches; and (2) they discriminated against the Catholics, Jews, and atheists.

Soon an effort was made to put all Christian churches on an equal footing by supporting all of them by taxation. Virginia made this proposal in 1784. The measure had distinguished supporters, including George Washington and John Marshall. But Thomas Jefferson and James Madison were against it. They marshaled the opposition; and Madison made their voices articulate in the *Memorial and Remonstrance Against Religious Assessments.* The proposal was defeated and Madison's *Remonstrance* has gone down in American history as the

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*This doctrine finds additional expression in the Constitution.

Prior to its adoption, the American States had some religious qualifications for public office; and religious oaths were required. For example, the Massachusetts Constitution of 1780 required state officials to swear:

"I believe the Christian religion, and have a firm persuasion of its truth."

Such requirements were plainly incompatible with the theory of separation of Church and State. Therefore, it was provided in the United States Constitution that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States." Article VI.

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most eloquent brief ever written on the need for separating Church and State and keeping them separate. Madison wrote:

"Rulers who wished to subvert the public liberty, may have found an established clergy convenient auxiliaries. A just government, instituted to secure & perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another. . . .

"Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. . . .

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe. . . .

"The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to over-

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leap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves."

The philosophy of the *Remonstrance* is fairly reflected in present day constitutional adjudications in the United States, as illustrated by *McCollum* v. *Board of Education*, 333 U. S. 203, and *Zorach* v. *Clauson*, 343 U. S. 306.

The *McCollum* case involved an Illinois program under which religious teachers of various denominations were permitted to give weekly religious instruction in public school buildings. Students whose parents so requested were excused from secular classes to attend the religious classes, but other pupils were not so excused. The Court held the program violated the prohibition of the First Amendment (as applied to the States by the Fourteenth Amendment) pertaining to separation of Church and State.

In the *Zorach* case, a New York law permitted public schools to release students during school hours at parental request to attend religious classes outside of the school grounds. The program involved neither religious instruction in public schools nor the expenditure of public funds. It therefore was held valid. The Court pointed out that while the separation must be absolute, insofar as free exercise of religion and the establishment of religion are concerned, the First Amendment "does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other." *Id.*, 312. The Court, while following the *McCollum* case, refused to hold that public schools cannot adjust their schedules to accommodate the religious needs of the people, stating, "We cannot read into the Bill of Rights such a philosophy of hostility to religion." *Id.*, 315.

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Bradfield v. *Roberts*, 175 U. S. 291, held that Congress could construct a hospital for the poor and authorize it to be managed by Sisters of the Catholic Church without violating the command of the First Amendment. And see *Quick Bear* v. *Leupp*, 210 U. S. 50. *Cochran* v. *Board of Education*, 281 U. S. 370, upheld the use of taxpayers' funds to supply all school children whether they attended private, religious, or public schools, with free text books.

The Justices have often disagreed on the application of the constitutional theory to the facts of particular cases; but the general principles, as stated in *Everson* v. *Board of Education*, 330 U. S. 1, are accepted by all:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*." *Id.*, 15–16.

Much the same philosophy is expressed in the Indian Constitution. Article 27 provides,

"No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination." Article 28 (1) further provides, "No religious instruction shall be provided in any educational institution wholly maintained out of State funds." Article 28 (2) is a saving clause which provides:

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"Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

Prime Minister Nehru recently emphasized that India is a secular, not a sectarian, nation:

"We call our State a secular one. The word 'secular' perhaps is not a very happy one. And yet for want of better we have used it. What exactly does it mean? It means freedom of religion and conscience, including freedom for those who may have no religion. It means free play for all religions subject only to their not interfering with each other or with the basic conceptions of our State. It means that minority communities from a religious point of view should accept this position. It means even more that the majority community, from this point of view, should fully realize it. For, by virtue of numbers as well as in other ways, it is the dominant community and it is its responsibility not to use its position in any way which might prejudice our secular ideal."

. . . . .

The First Amendment has a broad reach and includes the exotic forms of religion as well as the more conventional types.*

United States v. *Ballard*, 322 U. S. 78, involved the *I AM* movement, a group that claimed to receive divine messages from a deceased known as St. Germain. Their beliefs were held protected by the First and Fourteenth Amendments.

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*The Supreme Court of India in *Commissioner* v. ~~Hurt~~ Swamiar, 17 Sup. Ct. Jour. 335, 347, said that the guarantee of religious freedom contained in Article 25 of the Constitution covers a wide range:

"It is the propagation of belief that is protected, no matter whether the propagation takes place in a church or monastery, or in a temple or parlour meeting." *Id.*, 347.

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"Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position." *Id.*, 86–87.

The philosophy of the First Amendment's guarantee of religious freedom is well illustrated by *Board of Education* v. *Barnette*, 319 U. S. 624, which overruled *Minersville District* v. *Gobitis*, 310 U. S. 586.

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Most of us in America enjoy the flag salute ceremony. It is an exercise that always has new meaning, no matter how often we perform it. The right hand is either placed on the breast or raised with palm turned up, while the following pledge is recited in unison:

"I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Jehovah's Witnesses—a religious sect—object to the flag salute and refuse to perform it. They believe that it is forbidden by the commands of the Scriptures contained in Exodus ch. 20:

"(3) Thou shalt have no other gods before me.

"(4) Thou shalt not make unto thee a graven image, nor any likeness *of any thing* that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.

"(5) Thou shalt not bow down thyself unto them, nor serve them."

Some schools prescribe the flag salute for children. And a West Virginia school board expelled children of Jehovah's Witnesses for refusing to salute the national flag as part of the daily school exercise. Suit was brought by the parents to enjoin the school authorities from continuing to exact the flag salute ceremony as a condition of their children's attendance at the public schools. If the requirement violated the First Amendment, the suit would prevail, for as we have seen, the Due Process Clause of the Fourteenth Amendment makes the guaranty of religious freedom good against the States.

In 1940, the Supreme Court in the *Gobitis* case upheld the flag salute as constitutional in an opinion of Justice Frankfurther. Justice Stone dissented, saying that it compelled a person "to bear false witness to his religion." 310 U. S. 586, 604. In 1943, Stone's views carried the day. There was a new alignment in the Court, three of the Justices changing their earlier views and two new Justices participating. The *Barnette* opin-

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ion was written by Justice Jackson, who said, "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U. S. 624, 641–642.

The holding in the *Barnette* case has the flavor of Article 28 (3) of the Indian Constitution, which provides:

"No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto."

I notice qualifying language in the provisions of the Indian Constitution which guarantee religious freedom. Thus Article 25 (1) provides:

"Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

Article 26 provides:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

"(a) to establish and maintain institutions for religious and charitable purposes;
"(b) to manage its own affairs in matters of religion;
"(c) to own and acquire movable and immovable property; and
"(d) to administer such property in accordance with law."

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History shows that some repulsive practices have masqueraded under the guise of religion or otherwise sought its protection and blessing. The most notorious is human sacrifices, well-known in the animistic religions of Asia. In the Middle East there is an ancient temple of Venus, where sexual intercourse was part of an ordained religious service. In America, one religious sect was committed to polygamy and incorporated it firmly into its religious precepts. When those practitioners were prosecuted for bigamy, they pleaded the protection of the First Amendment. The leading American cases are *Reynolds* v. *United States*, 98 U. S. 145 and *Davis* v. *Beason*, 133 U. S. 333. The Court in the latter case held that while government could not interfere with "man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects," it could make laws governing the morals of its people. *Id.*, 342. The Court held that polygamy, offensive to the American community, could be outlawed; and it could not be saved under the guise of a religious tenet. As stated in the *Reynolds* case:

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void . . . and from the earliest history of England polygamy has been treated an an offence against society." *Id.*, 164.

Of like tenor is *Bombay* v. *Appa*, 39 A. I. R. 84, decided by the High Court of Bombay, upholding a statute prohibiting bigamous marriages, against the defense of freedom of religion guaranteed by Article 25 of the Constitution. To the same effect is the more recent case of *Saifuddin* v. *Moosaji*, 40 A. I. R. 183, decided by the same court. In that case an action was brought to obtain a declaration that orders of excommunication by a religious leader were void. The orders contravened a state law

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which prohibited the expulsion of a person from a religious community. The court held that although excommunication was "a religious practice," the legislature was not barred from outlawing it. ". . . a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality, health or a policy of social welfare upon which the State has embarked, then the religious practices must give way . . . ." *Id.*, 187.

It is not for one from the West to appraise or comment on the vice or evils of the practice of excommunication in the civilization of Asia. But certainly the approach of the court in the *Saifuddin* case is in harmony with the philosophy dominating the political thought of those nations which are secular, not sectarian.

I note Article 25 (2) of the Indian Constitution which provides:

"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

"(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

"(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

The reconciliation ~~between these provisions and Article 26, quoted above, which grants religious institutions the right to manage their own affairs,~~ has led to sharp controversies in the Indian courts.

Commissioner v. *Swamiar*, 17 Sup. Ct. Jour. 335, decided by the Supreme Court of India is one illustration. The case involved certain Maths, one of which was headed by the petitioner. The Hindu Religious Endowments Board intervened at a time when the affairs of the Math

of the rights of religious freedom and the limitations on those rights

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were in some financial difficulty, and requested petitioner to appoint a managing agent to handle the affairs of the institution. Difficulties arose between the agent and petitioner, and the Board finally declared that it believed the endowments of the Math were being mismanaged, and that a scheme should be framed for administering its affairs. The petitioner then sought to prohibit further Board action, contending that the law regulating the framing of a scheme and interfering with the management of the Math and its affairs by the Mathadhipati was an unconstitutional interference with religious rights under the Constitution. The High Court of Madras held several portions of the Act invalid under Articles 25, 26, and 27, and the Commissioner appealed to the Supreme Court.

In regard to Article 26, the Court stated that the question was, what were matters of religion and what were not? The former involved a fundamental right which no legislature could take away, while the right to administer the property of a religious organization was subject to regulation. A contention by the State that all secular activities associated with a religion are not "matters of religion" was rejected. The Court indicated that what is permitted by the Constitution is regulation of activities which are economic, commercial, or political, though associated with religious practices. Freedom of religion extends to some practices as well as to beliefs.* The law

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*What the Court in the *Swamiar* case said comports with the American theory: ". . . If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26 (b)." *Id.*, 349.

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must leave the right of administration to the religious denomination itself, subject to such restrictions and regulations as it imposes in regard to the use of property. A law which takes away completely the right of administration from a religious institution would be invalid under Art. 26 (d).

The Court then examined the Act in the light of these considerations. One section, which empowered the Commissioner to enter the premises to exercise his powers, without adequate safeguards for the religious group, was held invalid. Certain features of the legislation which unreasonably restricted the Mahant's right to dispose of the property were held invalid, as were provisions for taking over the secular affairs of the institution.* A challenge under Article 27 to provisions for payments by the religious institution to meet the costs of government supervision was rejected, since the purpose was not to foster a particular religion but to insure proper administration of religious institutions, in regard to secular and financial matters.

In *Ratilal* v. *Bombay*, 41 A. I. R. 388, the Supreme Court had before it questions concerning the constitutionality of the Bombay Public Trusts Act of 1950. Under the law, trustees of religious trusts were required to register and pay a fee of Rs. 25 for registration. Penalties were imposed for failure to register. These registration provisions were sustained against the claim that they interfered with the right of religious institutions, under Artcle 26, to manage their own affairs. The fees

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*In *Das* v. *Orissa*, 17 Sup. Ct. Jour. 329, 333, a provision of a state law gave an executive officer power to promulgate a program or scheme for the management of the financial affairs of religious groups. There was no provision for judicial supervision. For that reason, the Court held that provision of the law unconstitutional. It was, said the Court, "an [illegible] restriction upon the right of property of the superior of the religious institution which is blended with his office." *Id.*, 333.

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exacted were also sustained, even though it was pointed out that under the Jain religion the income from the property could be used only for a religious purpose. The Court held that the registration fee was incidental to proper management of the trust, as were municipal taxes. By like reasoning the Court sustained the provisions of the act requiring the trustees to keep their accounts in a prescribed manner.

The right of entry to religious properties granted the civil authorities was challenged. But the right was sustained, since the law provided that the officers making the entry were to give reasonable notice of their intent to enter and were to have due regard to the practices and usages of the religious sect. Cf. *Shastri* v. *Temple Committee,* 15 Sup. Ct. Jour. 310.

The provision of the law giving the court power to appoint the Charity Commissioner as trustee of the religious fund was held to be invalid. Such an appointment, said the Court, would amount to "a flagrant violation of the constitutional guarantee which religious institutions have under the Constitution in regard to the management of its religious affairs. . . . To allow the Charity Commissioner to function as the Shebait of a temple or the superior of a Math would certainly amount to interference with the religious affairs of this institution." *Id.*, 393.

The Court also held invalid certain provisons of the law applying the well-known doctrine of *cy pres* to religious trusts. The doctrine of *cy pres* was developed to grant courts power to prevent trusts from failing, due to circumstances which make their execution impossible.* In

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*The American Law Institute's *Restatement of the Law of Trusts* states the *cy pres* doctrine as follows:

"If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the applica-

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that event the Court could in effect rewrite the trust, giving effect as nearly as possible to the purpose which the donor had in mind.

Under the Bombay law, the Court could invoke the doctrine of *cy pres*, if the object of the trust was deemed not wholly or partially expedient, practicable, desirable, or necessary, and if it was thought desirable to apply the trust property to any other charitable or religious object. The Court held it to be an unconstitutional intrusion on the management of religious matters to allow "any secular authority to divert the trust money for purposes other than those for which the trust was created." *Id.*, 394. The Court further stated, "The State can step in only when the trust fails or is incapable of being carried out either in whole or in part." *Id.*, 394. And see *Das* v. *Orissa*, 17 Sup. Ct. Jour. 329.

These Indian cases have the flavor of American decisions dealing with controversies arising out of schisms in a church, where two conflicting sects lay claim, say, to church property, to the cathedral, or to perquisites of the cardinal, bishop, or minister. How is it determined which sect is the "proper" or "lawful" sect entitled to management of the church affairs? It was first decided in *Watson* v. *Jones*, 13 Wall. 679, that the question is answered by reference to ecclesiastical law or custom. Said the Court in the *Watson* case, ". . . whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.*, 727.

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tion of the property to some charitable purpose which falls within the general charitable intention of the settlor." *Id.*, § 399.

Cf. *Late Corporation of Latter-Day Saints* v. *United States*, 136 U. S. 1, where, on the revocation of the charter granted the Mormons for unlawful practices, the property was applied under the *cy pres* doctrine for use of the common schools of Utah.

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The same rule was applied recently to nullify a law of the State of New York which chose one of two sects of the Russian Orthodox Church as the true sect. *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94.

History is replete with examples where rulers sought to control the sectarian leaders, making them docile to the political dictates of the government. Bismarck in Germany sought to detach the Catholic Church from Rome by expelling unruly Jesuits and appointing to the Church episcopate men who would conform. The struggle for religious freedom in the western world was in large measure a struggle to keep the hand of Government off the church.

Sital Das v. *Sant Ram*, 41 A. I. R. 606, decided in 1954 by the Supreme Court of India, raised questions quite comparable to those in the *Watson* and *Kedroff* cases. The plaintiff brought suit to set aside a lease of realty made by one Kishore Das, admittedly the last Mahant of the Thakardwara. A defense was interposed, challenging the standing of the plaintiff to bring the suit on behalf of the religious order. Plaintiff claimed he was the lawful successor of Kishore Das. That claim was denied, the contention being that one Ishar Das was the legal Mahant.

The Court looked to ecclesiastical law to determine who the lawful successor was. "The law is well settled," said the Court, "that succession to Mahantship of a Math or religious institution is regulated by custom or usage of the particular institution, except where a rule of succession is laid down by the founder himself who created the endowment." *Id.*, 609. The opinion of Chief Justice Mukherjea is witness to the conscientiousness with which the Indian judiciary looks to ecclesiastical custom for answers to the questions of succession.* Any other course

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*And see *Saraswathi* v. ~~Amma~~ Ammal, 16 Sup. Ct. Jour. 714, 719, where the Supreme Court in holding invalid a perpetual dedication of property for worship at a tomb said, ". . . what is a religious purpose under the Hindu law must be determined according to Hindu notions."

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would, indeed, implicate the civil authorities in affairs of the church, contrary to the conception of the secular state. The unanimity of the Supreme Court of India should be enlightening to the dissenting American judges who have felt that the judiciary or legislature could decide these questions of right to possession of church property or the legality of claims to succession, without reference to ecclesiastical law or custom.

We have had much litigation in the United States over the attempts of municipal or state authorities to license, tax, and in other respects control the activities of religious groups. The litigation has involved mostly the sect known as Jehovah's Witnesses, who go from door to door distributing religious literature or soliciting purchases of it. Sometimes they stand on street corners and seek to interest passer-bys in their tracts. They are a religious sect which may not be discriminated against. For example, if other religious groups are entitled to hold open meetings in the parks, this group must be included. So held the Court in *Niemotko* v. *Maryland*, 340 U. S. 268.

A municipality in Pennsylvania sought to exact a license tax from these Jehovah's Witnesses for their soliciting activities. The Court, in *Murdock* v. *Pennsylvania*, 319 U. S. 105, held that tax unconstitutional under the First and Fourteenth Amendments. "The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." *Id.*, 108. "The power to tax the exercise of a privilege," said the Court, "is the power to control or suppress its enjoyment." *Id.*, 112.

By like reasoning, a city ordinance forbidding any person to knock on doors, ring doorbells, or otherwise summon to the door the occupants of any residence for the purpose of distributing handbills or circulars was held unconstitutional, as applied to a Jehovah's Witness distributing advertisements for a religious meeting. *Martin* v. *Struthers*, 319 U. S. 141.

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Licensing requirements for these religious sects have also been struck down. (See *Jones* v. *Opelika*, 319 U. S. 103, overruling *Jones* v. *Opelika*, 316 U. S. 584) since the power to grant or to withhold a license to practice a religion is a power of life or death over that religion. The *Jones* case involved Jehovah's Witnesses. *Kunz* v. *New York*, 340 U. S. 290, involved a Baptist. A municipal ordinance required a permit from the police commissioner for a person to preach or expound a religious faith in a public place. A Baptist minister spoke outdoors without a permit and was convicted for that omission. The Court reversed his conviction, holding that a licensing system so vague and general, as to give the police commissioner power to pick and choose among religions, laid a forbidden burden on the exercise of religious liberty.

Licensing provisions as applied to religious workers are a previous restraint upon the free exercise of religion. When the licensing authority has unbridled discretion to determine whether a particular group is a religious group, there is censorship in the worst form. The fact that there would be a judicial remedy for abuse of the authority of the licensing agency is not enough. The licensing system would still be a previous restraint upon the exercise of a freedom guaranteed by the Constitution. If one has to get a permit to perform his religious practices, his exercise of religion is not free, but is dependent upon the consent or approval of government. Freedom to practice a religion is as much a part of religious freedom as freedom to believe. The State may regulate times and manner of solicitation so as to prevent frauds upon the people. The State may regulate the use of its streets and parks. But any such regulation that touches religious practices must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." Those are the teachings of the leading American case, *Cantwell* v. *Connecticut*, 310 U. S. 296, 311.

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In that case a Jehovah's Witness was on a street acting in an orderly manner. He had a phonograph record which he asked two pedestrians to hear played. They stopped while he played the record. The record was an attack on all organized religion, especially the Catholic Church. The record incensed the two hearers, who complained to the authorities, who in turn arrested the Witness. He was convicted for inciting a breach of the peace. In reversing, the Supreme Court said:

"In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Id.*, 310.

There is, however, room for the police power, even in the field of religious practices. The *Reynolds* and *Beason* cases, already discussed, show that immoral practices, traveling under the cloak of religion, may be outlawed by the state. Other regulations are permissible. Thus, *Prince* v. *Massachusetts*, 321 U. S. 158, sustained a Massachusetts statute, as applied to Jehovah's Witnesses, making it unlawful for a parent or guardian to permit a boy under 12 or a girl under 18 to sell periodicals on the streets or in public places. In the *Prince* case, protection of the welfare of children against the vicissitudes of life upon the streets was held to be a valid restriction on the free exercise of religion.

Cox v. *New Hampshire*, 312 U. S. 569, involved a licensing ordinance for parades or processions upon public streets. Jehovah's Witnesses paraded without a license and were convicted for the offense. Their conviction was

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sustained by the Supreme Court against the claim that the ordinance infringed their right to religious freedom. The Court said:

"Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions." *Id.*, 574.

The *Cox* case comes to mind when one reads *Siddiqui* v. *Uttar Pradesh*, 41 A. I. R. 756. That case involved the question of the rights of two religious sects to hold processions. The High Court of Allahabad sustained a magistrate in denying permits. One sect was the Sunni Mohammedan; the other was the Shia Muslim. When the former took out a procession and recited the Madhe Saheba, the latter claimed they were duty bound to take out their procession and recite the Tabarra. The Court sustained the magistrate in denying procession permits to both groups, on the grounds that the procession would be likely to result in a breach of the peace.

Chaplinsky v. *New Hampshire*, 315 U. S. 568, is in the same tradition. A Jehovah's Witness was distributing literature of his sect on the streets of Rochester, New Hampshire. His denunciations of other religions caused a crowd to gather; and a policeman intervened to escort the Witness away. The latter shouted to a local official, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." He was convicted of violating an ordinance, making it a crime to call a person who is lawfully in a public place "by any offensive or derisive name." The Court sustained the law, as narrowly drawn to punish words "likely to cause a breach of the peace." *Id.*, 573.

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In other words, religion is no excuse or justification to indulge in threatening, profane, or obscene revilings that would cause the average man to fight.

Our conception of religious freedom has had many ramifications in our system of laws. A few examples will illustrate the variety of problems posed by it.

One relates to education in the public schools. In the 1920's, Oregon made it mandatory for a parent or guardian to send a child between eight and sixteen years of age to the public schools. The Society of Sisters, a Catholic organization interested in the care of orphans and the education and instruction of youth, and a private military academy for boys, challenged the constitutionality of the law. The Court, in *Pierce* v. *Society of Sisters*, 268 U. S. 510, held the Oregon statute unconstitutional, as infringing the "liberty" of the people without due process of law within the meaning of the Fourteenth Amendment. The Court ruled that, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, 535. The *Pierce* case is not a decision precisely under the First Amendment. But the concepts of separation of Church and State, freedom of conscience, and religious liberty gave strong overtones to the decision.

Another emanation from the First Amendment concerns the exemptions granted ministers of religion and conscientious objectors from military service. It has never been held that religious belief would constitutionally exempt a person from the duty of serving in the Armed Forces. Quite the contrary. *Hamilton* v. *Regents*, 293 U. S. 245, held that a State could refuse to admit students to its universities, unless they agreed to take military training. "Liberty" under the Fourteenth Amendment, it was held, does not include immunity from military service on the ground of religious scruples. But the draft laws have commonly contained exemptions for ministers and allowed conscientious objectors to be as-

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signed to noncombatant duties. See *Selective Draft Law Cases*, 245 U. S. 366. The present law contains a provision which is quite lenient.* The cases are legion.** I do not stop to comment on them beyond saying that the exemption has been liberally construed and its benefits extended even to the most stubborn and cantankerous objector.

Another reflection of the philosophy of the First Amendment is seen in the status of the conscientious objector in civil affairs. The denial by Illinois of the right to practice law to one who had conscientious scruples, preventing him from serving in the state militia in time of war, was upheld in *In re Summers*, 325 U. S. 561, by a closely divided Court. Aliens have been denied naturalization on the same grounds, *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605. The latter decisions also reflected very close divisions in the Court. But there was continuing

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*"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate . . . ." 50 U. S. C. App. § 456 (j).

**For recent cases dealing with the problem see *Dickinson* v. *United States*, 346 U. S. 389; *Sicurella* v. *United States*, 348 U. S. 385; *Witmer* v. *United States*, 348 U. S. 375.

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force in the argument that freedom of conscience should permit the citizen the choice to bear arms or to serve his country in other ways. That view is reflected in the case of *Girouard* v. *United States*, 328 U. S. 61, overruling *Schwimmer* and *Macintosh*. The oath to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," and to "bear true faith and allegiance to the same" was held not to require a promise to bear arms. "The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity." *Id.*, 64–65.

The *Girouard* case was also by a divided court. But it aligned America once more on the side of freedom of conscience against the pressures to make the individual conform his personal scruples to the attitudes of the majority.*

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*The conflict between law and conscience is a recurring one in every land. Professor David Spitz of Ohio State University recently stated the case for the school of thought giving pre-eminence to the conscience:

"Whether laws prescribing affirmations of loyalty, or sustaining legislative inquiries into one's past or present beliefs and associations, or proscribing the expression of revolutionary ideas, are of this variety, each man must judge for himself. If he dislikes such laws but does not regard them to be a crucial violation of or threat to democracy, he will obey them. If, however, he views such measures as destructive of the very principles that constitute the system to which he has given his allegiance and which he is pledged to uphold, he may see no moral alternative to disobedience. In the judgment of others, his conscience may be wrong; but if he is to retain his dignity as a man he must act upon it. He may fail by such action to impress the value of his idea on others, but in no other way can he hope to correct the tragic lesson of history which 'shows that good causes are more often defeated by negligence in the pursuit of the right than by positive forces of evil.'

"So long as a man comes to this decision honestly, in accord with

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Summary.

I have mentioned earlier the preferred position of freedom of speech, of the press, and of religion under the American constitutional scheme. They are preferred because they are guaranteed against both state and federal action. They are preferred because they are placed high above the reach of any legislature in the country. They deserve that preference because of the great role they perform in a democratic state. ~~It would be unthinkable that the~~ universal franchise could not flourish without freedom of speech and of the press. The principle of "the consent of the governed" would have no meaning if public discussion were banned, if the "pros" and "cons" of public questions could not be discussed. Then we would have a totalitarian system, where the electorate did what it was told, where dissidents were jailed or executed, where the voices of dissenters were stilled. Freedom of speech and freedom of the press go hand in hand with the democratic process.

Freedom of religion is also indispensable to democratic society. Man can walk with dignity and independence only if he is free to practice and preach the religion of his choice, only if he can obey the dictates of his conscience. The strength of democracy is its recognition of the rights of each and every minority in society. The smallest minority of all is one man's conscience. There can be no real freedom unless the conscience is free to express itself and unless man is free to obey its small voice.

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moral principles to which he is firmly committed, and so long as his act of disobedience is calculated—taking the whole situation into view—to achieve a greater good than is likely to be achieved by his acquiescence, I cannot believe that he can be said to have denied his fundamental obligation either as a good man or as a good citizen." 48 American Political Science Review 386, 402–403.

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TAGORE LECTURES

X

The Right to a Fair Trial

A civilized system of law is as much concerned with the *means* employed to bring people to justice as it is with the *ends* themselves. A first principle of Anglo-American jurisprudence is that the ends do not justify the means. That is, indeed, basic to the conception of due process in the procedural sense. This is common meeting ground for East and West. As Gandhi once wrote, "The means may be likened to a seed, the end to a tree; and there is just the same inviolable connection between the means and the end as there is between the seed and the tree."

A. *The Court.*

There was a time in the Western world when a man could be condemned by edict of a ruler or by a law enacted by the legislative body. The latter is the notorious bill of attainder, outlawed by Article I, Section 10 of the Constitution, so far as States are concerned, and by Article I, Section 9, so far as the Federal Government is concerned. Historically a bill of attainder was a legislative act condemning a man to death. The infliction of punishment less than death was a bill of pains and penalties. But the latter is included within a bill of attainder as used in the Constitution. *Cummings* v. *Missouri*, 4 Wall. 277, 323. Condemning a man by legislative decree that im-

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poses fines, penalties, or disabilities upon him has become a rare thing since the adoption of the Constitution. A few such practices have, however, appeared and the Court has reacted decisively to them.

Cummings v. *Missouri*, 4 Wall. 277, involved a provision of the Missouri Constitution, adopted while passions of the Civil War raged, which required persons practicing a profession to take an oath of loyalty that they had never given aid or comfort to persons engaged in hostility to the United States nor been a member of an organization inimical to the Government of the United States. *Ex parte Garland*, 4 Wall. 333, decided the same day, involved an Act of Congress which required attorneys practicing before the Supreme Court to take a similar oath. The purpose of these laws was to penalize those who had been active in the Civil War on the side of the South or sympathetic with it.

The deprivation of civil rights for past conduct was held to be punishment prohibited by the Constitution, unless through a judicial trial. And even a judicial trial could not reach back and make unlawful an act which was not proscribed when committed, for that would be an *ex post facto* law, also outlawed by the Constitution.*

And see Stewart v Kreger, 295 U.S. 403

*Article 20 (1) of the Indian Constitution contains a provision analogous to the prohibition against *ex post facto* laws in the American Constitution. Article 20 (1) states:

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

The prohibition of this Article was held to bar prosecution of landlords under a rent control act which was not in force at the time of their offense. See *Krishna* v. *Satyaranjan*, 40 A. I. R. 599, decided by the High Court of Calcutta.

In *Singh* v. *Vindhya Pradesh*, 16 Sup. Ct. Jour. 563, the Supreme Court pointed out that what is prohibited under this provision is "only conviction or sentence under an *ex post facto* law and not the trial thereof. Such trial under a procedure different from what

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See Article I, Sections 9 and 10. The fact that a class of people was condemned, rather than named individuals, made the law no less a bill of attainder. The fact that the condemnation was conditional likewise made no difference. For the innocence of the accused would have to be established by the expurgatory oath. In other words, the particular laws assumed the guilt of these people and adjudged and imposed the penalty conditionally. Said the Court in the *Cummings* case, "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act." *Id.*, 327.

And in the *Garland* case, the Court said, "The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor . . . It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency." *Id.*, 379. So the bills of attainder in both the *Cummings* and the *Garland* cases were nullified.

The latest application of that principle was in 1946 in the case of *United States* v. *Lovett*, 328 U. S. 303. A Congressional Committee, investigating "un-American activities," attacked certain government employees as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and affiliates of "Communist front organizations." An amendment was proposed to an Appropriation Bill, providing that no part of the appropriation should be used to pay the named individuals. In lieu thereof, a resolution was adopted authorizing the Committee to

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obtained at the time of the commission of the offence or by a Court different from that which had competence at the time cannot *ipso facto* be held to be unconstitutional." The Court held that the law at the time of the offense was substantially the same as that at the time of conviction and therefore the prohibition of Article 20 (1) was not violated.

Id. 56

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report on the matter. Hearings were held "in secret executive session." The employees charged with "subversive" activities were allowed to testify but their counsel were not permitted to be present. Much of the evidence adduced was never made public. But the Committee returned a report condemning three employees as having engaged in "subversive activity." * Accordingly, the Appropriation Bill was amended, barring the use of any funds made available under the Act or thereafter made available under any Act to pay any salary or compensation to any of the three men.

The Court construed the amendment as designed permanently to bar these employees from government service. It accordingly condemned the law as an *ex post facto* law and as a bill of attainder. The law had the effect of a legislative decree, perpetually excluding the named men from their chosen profession.** It was punishment without a judicial trial—punishment for an act first called an offense after it had been committed. The Court said:

"Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts." *Id.*, 317.

The philosophic basis for condemnation of the bill of attainder was stated over a century ago by Dr. Richard

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*The Committee stated: "Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage." *Id.*, 311.

**Cf. *Ameerunnissa* v. *Mahboob*, 16 Sup. Ct. Jour. 61, discussed in Lecture XI.

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Wooddesson in *Lectures on the Law of England* (1834, 2d ed.) Vol. 2, pp. 384–385:

". . . All civil magistracies have in reason their appointed province. The legislative ought not to entrench on the judicial. Legislation, as it is the noblest exertion of human sovereignty, is the hardest task of human wisdom; and should not be perplexed by such temporary considerations or conjunctures as might hazard impartiality of decision. Hence the political congruity of first enacting laws, and then enforcing them on subsequent occasions, and by different magistrates, has been confirmed by the very uniform usage of the world; in the observance of which the subjects of every state have been thought deeply interested. Thus, when a general law is made restraining crimes, the due application of it is a new field to exercise the faculties of our minds. To do the whole at once is relying too much on our judgments, especially when the various passions are heated or alarmed by an interesting crisis. Such is not the time practically to overturn legal institutions, which have either been sanctioned by long tradition and experience, or were dictated by temperate reflection; and having universality for their object, were uninfluenced by present fears, and personal enmity or favor."

The requirements for a fair trial are varied. They are not satisfied, if the court is a partial, prejudiced tribunal bent on conviction. It is fatal if the court is an instrument of the prosecution or has interests aligned with one side of the controversy. Our leading case is *Tumey* v. *Ohio*, 273 U. S. 510, in which the late Chief Justice Taft wrote for a unanimous Court. Under Ohio law the mayor of a village could try violations of the liquor law. He tried and convicted one Tumey and fined him $100. The case went through the Ohio courts and reached the Supreme Court on a question of due process of law under the Fourteenth Amendment. As compensation for hearing these liquor cases, the local judge was authorized to

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retain the amount of the costs in each case. No fees were paid him, if a defendant were acquitted. He was compensated for his services as a judge only if he convicted the defendant. The judge therefore had a direct, personal, pecuniary interest in reaching a decision against the defendant. Such a hearing, the Court held, denied an accused due process of law. "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.*, 534.

All matters touching on judicial qualification to sit in a particular case do not go to the question of the constitutional validity of the trial. Generally speaking, personal bias, kinship, remoteness of interest of the judge in the litigation, involve matters of legislative discretion. *Id.*, 523. For federal judges, Congress has provided:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U. S. C. § 455.

And 28 U. S. C. § 144 provides the machinery for parties to move that the judge, before whom a matter is pending, has a personal bias or prejudice which disqualifies him.

American judges are extremely sensitive to sitting in any case where any question of propriety of their participation might be raised. Very few have soiled the bench by malpractices of that character.

Prejudice and partiality of the judge are questions often raised in criminal contempt cases. Rule 42 (a) of the Federal Rules of Criminal Procedure provides:

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct con-

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stituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

This Rule substantially restates the principles of our leading cases of *Ex parte Terry*, 128 U. S. 289, and *Cooke* v. *United States*, 267 U. S. 517. The power to punish summarily for criminal contempt without the procedural safeguards of the Bill of Rights rests on the necessities of the administration of justice, as I indicated in the preceding Lecture. The power is often referred to as an inherent power of the judicial branch. See *Myers* v. *United States*, 264 U. S. 95.

The Constitution of India recognizes it as such. Article 215 provides: "Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself." Article 129 contains a similar provision for the Supreme Court. The Supreme Court of India held in *Singh* v. *Singh*, 41 A. I. R. 186, that the power of a High Court to punish summarily for contempt of court is an inherent one, which neither the Parliament nor the Supreme Court can modify or alter.*

In that case there was an application asking for the transfer of certain contempt cases from the High Court

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*An interesting contempt case from the courts of India is *Shafi* v. *Bakhsh*, 36 A. I. R. 270, in which the High Court of Lahore held a judge in contempt for insulting a lawyer and another judge. The lawyer was verbally chastised by the judge for obtaining an injunction to restrain proceedings in the judge's court. The High Court pointed out that such abuse of an officer of the court would not be tolerated. The court is not the judge alone—the court is the institution of which the judge is one part and the attorneys are another.

The decision would come as a surprise to the American bar that is accustomed only to judges holding lawyers in contempt. But it is sound in theory and consistent with the ~~theory~~ concept of contempt developed in Anglo-American law.

While the case arose prior to the present Constitution of India, one writer, at least, appears to feel that it is still good law in India. See 41 A. I. R. Journal 45.

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of Pepsu to another or, in the alternative, that the matter should not be heard by two judges of the High Court of Pepsu. The Supreme Court refused to act for lack of power. It added:

"We wish, however, to add that though we have no power to order a transfer in an original petition of this kind we consider it desirable on general principles of justice that a judge who has been personally attacked should not as far as possible hear a contempt matter which, to that extent, concerns him personally. It is otherwise when the attack is not directed against him personally. We do not lay down any general rule because there may be cases where that is impossible, as for example in a court where there is only one judge or two and both are attacked. Other cases may also arise where it is more convenient and proper for the judge to deal with the matter himself, as for example in a contempt 'in facie curiae.'" *Id.*, 190.

The fitness of the judge, who cites a lawyer or newspaper for contempt, to sit in judgment on the accused is an oft-recurring question in American law. Two recent cases brought the issue to the Supreme Court. *Sacher* v. *United States*, 343 U. S. 1; *Offutt* v. *United States*, 348 U. S. 11. In each, the trial judge and the lawyers got into a running quarrel, one provoking the other and making an unseemly episode. In the *Sacher* case, the Court, by a divided vote, sustained the trial judge, holding it not improper for him to act as prosecutor and judge. In the *Offutt* case, the Court, also by a divided vote, set the judgment of conviction aside, holding that the trial judge should not have sat, but that the matter should have been heard by "a judge not involved" in the controversy. *Id.*, 15. The Court said:

"The question with which we are concerned is not the reprehensibility of petitioner's conduct and the consequences which he should suffer. Our concern is with the fair administration of justice. The record discloses not

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a rare flare-up, not a show of evanescent irritation—a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." *Id.*, 17. And see *Cooke* v. *United States*, 267 U. S. 517, 539.

A rather bizarre use of the summary contempt power is recorded in the recent case of *In re Oliver*, 333 U. S. 257. This was the famous one-man grand jury case from Michigan. In 1917 Michigan vested its judges with investigatory powers in order to make probes into the alleged misconduct of public officials more effective. The law combined in one man the investigatory and the judicial functions. The judge was authorized to appoint prosecutors, detectives, and aides. The judge sat in secret sessions, summoning witnesses before him. The power was an ambulatory one, as the judge could sit anywhere, in the courthouse or in a hotel room. A witness could be asked questions on all subjects and need not be advised of his privilege against self-incrimination. If he failed to appear, or failed to answer material questions, or if the judge believed his evidence false, evasive, or deliberately contradictory, the judge could find him guilty of contempt and fine him not more than $100, or imprison him for 60 days, or impose both penalties. If, after sentence, the witness answered the questions satisfactorily, the judge in his discretion might commute or suspend the sentence. If the witness was recalcitrant, he could be resummoned at the end of his first sentence, asked the

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questions again, and be sentenced a second time, if he again failed to answer or if the judge felt once more that his answers were not adequate.

The Court held the procedure unconstitutional under the Due Process Clause of the Fourteenth Amendment.* The secrecy of the trial was at war with the tradition of the public trial in Anglo-American jurisprudence. The summary nature of the proceedings also violated due process. For the accused was deprived of his day in court—he had no reasonable notice of the charge against him; he had no opportunity to be heard in his own defense; he had no right to examine witnesses against him; he had no opportunity to offer testimony; and he was not represented by counsel. Due process requires "a charge fairly made and fairly tried in a public tribunal." *Id.*, 278.

Due process also requires, as Justice Rutledge demonstrated in a concurring opinion, that the judicial function be kept separate from the investigative and prosecuting functions. Certainly the combination of the three in one man is foreign to Anglo-American jurisprudence as it evolved after the abolition of the Star Chamber and the High Commission in 1641. As Justice Rutledge said, "This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law at the time our institutions crystallized in the Constitution." *Id.*, 279.

The trial should take place in an atmosphere of quietness, dignity, and detachment from the passions of the community. A trial that has the atmosphere of a "lynching bee" is no trial at all, in the constitutional sense. Such was the holding of *Moore* v. *Dempsey*, 261 U. S. 86, decided in 1923. Some Negroes had been convicted in a state court of the murder of a white man. They were sentenced to death; and after exhausting the remedies available to them under state procedure, they sought relief

See In re Murchison + White 349 U.S. ——

*Courtney v. Schneider, 348 U. S. 933, is a like case from Kansas which the Court reversed on authority of *In re Oliver*.

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by way of *habeas corpus* in the federal court.* Justice Holmes summarized the charges which, if true, made out a case of denial of due process of law:

"On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob." *Id.*, 89–90. And see the concurring opinion of Justice Jackson in *Shepherd* v. *Florida*, 341 U. S. 50.

Such a trial is only a farce. It gives no fair opportunity to defend. Passion, rather than reason, rules. The courtroom is not a place of quiet dignity, where the evidence is weighed carefully and dispassionately. The courtroom is dominated by a mob. Hysteria takes the

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*A leading case from the state courts is *State* v. *Weldon*, 91 S. C. 29, decided by the Supreme Court of South Carolina. In that case, a conviction was reversed because of mob influence. It appeared that defense counsel, fearing the crowd in and about the courtroom, gave up his right to ask for a continuance. The courtroom was so filled with a hostile crowd that some persons overflowed into the area around the prisoners, counsel, and jury, so that defense counsel at times could not see the witnesses or jury.

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place of calm deliberation. The court has become an instrument of public passion. A person tried in those circumstances is not granted that procedural due process which the American Constitution guarantees.

The clamor of the press, the agitation of mobs, the levelling of propaganda on the judge—each of these can produce the results condemned in *Moore* v. *Dempsey*.

B. *The Police.*

Three classic accounts of the practices of the police made a great impression on me. One, dated 1905, came from India and is entitled, *Report of the Indian Police Commission and Resolution of the Government of India.* The second is dated 1931 and came from America. It is *The Third Degree*, included in the *Reports of the National Commission on Law Observance and Enforcement*, vol. IV. The third was made in England in 1929. *Report of the Royal Commission on Police Powers and Procedure.* One cannot read these Reports without realizing that police have much in common the world around. I do not know what may be at the root of the problem in Asian communities. I do say, however, that the British practice is far above our own and that the British standards should be our goal.

In America, the chief complaints against the police are, in the main, traceable to the following influences:

—the relation of sinister politics to the police services;

—entrusting the office to men largely untrained in scientific principles of administration;

—reliance on brawn more than on brains for law enforcement;

—relegation of the police service to a low estate, including the payment of inadequate salaries;

—the absence of strict standards for the prompt arraignment of prisoners, for the granting of bail, and for the opportunity of prisoners to consult with counsel.

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Those influences do not permeate every police organization in America. Moreover, American police conditions have been greatly improved by the Federal Bureau of Investigation, whose training schools have helped greatly to raise the police standards in all the States.

Not all of the police practices I have listed are relevant here. We are presently concerned only with those which have such an impact on the trial as to raise either a question of the fairness of the practice or of its constitutionality.

The Royal Commission reported in 1929, ". . . we conceive it to be a principle inherent in the English law that no person shall be deprived of his liberty except by a magistrate or Court. Admittedly there is the power of arrest, whether by the Police or a member of the public, but this power of arrest is only with a view to the production of a prisoner before the magistrate . . . ." *Id.*, 57.

That principle is deepseated. It starts with a provision of the Magna Carta respecting the manner of arrests:

"No free man shall be taken, or imprisoned, or outlawed, or exiled, or in any way harmed, nor will we go upon or send upon him, save by the lawful judgment of his peers or by the law of the land."

The aim of an arrest is not sequestration of a suspect nor his detention for purposes of interrogation. The purpose of the arrest is assurance that he will respond to a criminal charge. A warrant of arrest directs the arresting officer to produce the arrested person in court, either at the time fixed in the warrant or within a reasonable time after the arrest. One who makes an arrest without a warrant has authority to detain the prisoner only for such a time as may be reasonably necessary to procure a legal warrant for his further detention, or until a preliminary hearing of the charge against him can be had.

This is the procedure provided by statute in practically all of the States. As for arrests, by federal officers, Rule 5 (a) of the Federal Rules of Criminal Procedure provides:

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"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

At the hearing it is decided whether the evidence against the accused is sufficient to warrant further proceedings or whether he is to be released. At these hearings the police testify, other witnesses testify, and the accused testifies, if he chooses. If the offense is a petty one, the question of guilt can be determined at once. If the accused is held for trial, then he has an opportunity to obtain release on bail, which will ensure his personal freedom, even after a lawful arrest, until he is tried. The right to bail before trial is sacred in the American system, as shown by the Eighth Amendment. Moreover, Rule 46 (a) of the Federal Rules of Criminal Procedure provides: "A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense."

Production of the accused before the magistrate serves another function. It brings him to the public eye and makes possible a contact with his family, his friends, and his lawyer. It puts an end to the possibility of detention *incommunicado*.

Prompt production before a magistrate is therefore essential to protection of the rights of the accused. He is presumed innocent until proven guilty. But the police have often assumed the opposite and subverted a lawful arrest to oppressive ends. It is with those practices that we are concerned here.

The practice of imprisoning a man without disclosure

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of the precise accusation against him once flourished in England.

The matter came to a head in the *Petition of Right* in 1628, which complained to the King that "divers of Your Subjects have of late been imprisoned without any Cause shewed; and when for their Deliverence they were brought before your Justices by Your Majesty's Writs of *Habeas Corpus* . . and their Keepers commanded to certify the Causes of their Detainer, no Cause was certified, but that they were detained by Your Majesty's special Command, signified by the Lords of Your Privy Council, and yet were returned back to several Prisons, without being charged with any Thing to which they might make Answer according to the Law."

The issue was forced by reason of the practice of the King in requiring forced loans from citizens and putting them in jail if they refused. Thomas Darnel was one victim in the year 1627. He sought release from prison by *habeas corpus*. The court required the jailer to disclose by what authority Darnel was held. The jailer showed that Darnel was detained by special order of the King. Darnel argued that if that was a justification for his detention, citizens may be "restrained of their liberties perpetually."

The court was apparently troubled, for it heard long arguments and deliberated some days. Finally the judges delivered a long opinion, saying that they were required to "walk in the steps of our forefathers" and deny the relief. The word of the King was sufficient to hold a man, they said, for "we trust him in great matters." 3 How. St. Tr. 1.

The *Petition of Right* and Darnel's case is part of the background of the provision in the Sixth Amendment that:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

When the police use the arrest to detain the prisoner and to exact a confession from him the processes of the

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law are perverted. The period of detention before the accused is brought before the magistrate is the awful lull. Then the accused is completely at the mercy of the police.*

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*Article 22 (2) of the Indian Constitution provides:
"Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

The Indian courts indicate that strict compliance with the terms of this provision will be required. In *Keshavram* v. *Hasan*, 41 A. I. R. 636, the Supreme Court held that failure to produce a prisoner before a magistrate in the time provided by Article 22 (2) warranted his release. Cf. *Punjab* v. *Singh*, 40 A. I. R. 10.

The guarantees of Article 22 (2) do not, however, apply to any person detained under a law providing for preventive detention. Article 22 (3). Such detention legislation is provided for in some detail in Article 22 (4) to (7). Of particular importance is Article 22 (5), which provides:

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

The scope of protection afforded by Article 22 (5) was defined in *Bhardwaj* v. *Delhi*, 16 Sup. Ct. Jour. 444, where the requirement of informing the dentenu of the grounds of detention was sought to be satisfied by the recital; "You have been organising the movement (The Jan Singh) by enrolling volunteers among the refugees in your capacity as President of the Refugee Association of the Bara Hindu Rao." The Court held that the adequacy of the grounds stated under Article 22 (5) was a justiciable question, and that since the detenu would often be an inexperienced layman, it was important to inform him of the grounds in clear and understandable terms. Such clarity was essential so that the detenu could make an adequate representation against the order of detention. The detenu was held entitled to as full and clear a disclosure as the circumstances would permit. The grounds stated in the case at bar were held to be too vague to meet that standard. The Court's attitude in such cases was to make full use of the safeguards contained in Article 22, for "Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper

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For an exhaustive analysis of preventive detention in the Indian constitutional scheme, see Choudhury v. The Chief Secretary, India L. Rep. 1964, 1 Calcutta 1, especially the opinion of Justice P. B. Mukherji pp. 33 at seq.

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reventive detention, which is hostile to American ideas of
rights, is defended in India on the grounds of necessity.
it is said, has today a much more fragile society than the
n democracies. If it is to survive as a democracy, it must
e to protect itself from the violent, disruptive forces that
to tear it apart and make its government ineffective. These
tive forces in India are mostly communist or communist inspired.

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Cruel police use torture. Torture produced the heinous instruments which history records—the rack, the thumb-screw, and the wheel. Hitler added the dentist's drill to

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exercise of the power must be jealously watched and enforced by the Court." *Id.*, 447.

And see: *Gopalan* v. *Madras*, 13 Sup. Ct. Jour. 174; *Bombay* v. *Vaidya*, 14 Sup. Ct. Jour. 208; *De* v. *West Bengal*, 14 Sup. Ct. Jour. 233; *Bhardwaj* v. *Delhi*, 16 Sup. Ct. Jour. 441; *Lal* v. *Uttar Pradesh*, 41 A. I. R. 179; and *Singh* v. *Pepsu*, 41 A. I. R. 276.

An interesting article, *The Law of Preventive Detention*, by U. S. Ramachandran, 17 Sup. Ct. Jour. 181, traces the history of preventive detention in India to the East India Company Act of 1795.

The nearest procedure America has to preventive detention is the provision in the Immigration Act of 1952, 8 U. S. C. § 1252 (a). By that Act an *alien* may be arrested and taken into custody *pending deportation proceedings*. That is, however, designed merely as a step in effectuating deportation, not as a means of instituting a program of preventive detention similar to that authorized by Article 22 of the Indian Constitution.

The fact that detention will lead to a loss of freedoms guaranteed by Article 19 will not necessarily make it unlawful. *Gopalan* v. *Madras*, 13 Sup. Ct. Jour. 174; *Singh* v. *Delhi*, 14 Sup. Ct. Jour. 374.

While the Court will not substitute its own satisfaction for that of the authorities ordering detention, the good faith of the persons ordering detention under preventive detention legislation may be inquired into. *Lahiry* v. *Delhi*, 13 Sup. Ct. Jour. 433.

And see: *Krishnan* v. *Madras*, 14 Sup. Ct. Jour. 453; *Dass* v. *Punjab*, 14 Sup. Ct. Jour. 747; *Tarsikka* v. *Punjab*, 14 Sup. Ct. Jour. 835; *Venkateswaraloo* v. *Supt.*, 16 Sup. Ct. Jour. 1; *Parulekar* v. *Bombay*, 16 Sup. Ct. Jour. 28; *Singh* v. *Punjab*, 15 Sup. Ct. Jour. 111; *Pangarkar* v. *Bombay*, 15 Sup. Ct. Jour. 235; *Parulekar* v. *District Magistrate*, 15 Sup. Ct. Jour. 476; *Bombay* v. *Naik*, 15 Sup. Ct. Jour. 503; *Singh* v. *Punjab*, 15 Sup. Ct. Jour. 521.

Habeas corpus, which is a constitutional guarantee in India, is, of course, of no avail where preventive detention is resorted to by the Government. But habeas corpus serves the function of testing all forms of detention and the Supreme Court over and again emphasizes the high role the Great Writ serves. Thus, in *Singh* v. *Delhi*, 16 Sup. Ct. Jour. 326, 327, it was said:

"This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law."

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the list; and his Gestapo would drill one tooth after another until the victim confessed.

In Morocco the French get confessions from the Moors by attaching electrodes to the genitals and sending wave after wave of electricity into the body.

Police may also break men by giving a dress rehearsal of the threatened execution at the electric chair; by taking them into the woods, feigning a lynching; by whipping them.

The police may use a subtler method: examination for hours on end by a relay of men. During this time the accused may look into a blinding light, unable to see his tormentors. Or he may go without food or water or sleep.

The police often use subtler methods still: a doctor or psychoanalyst may be introduced to play the role of a friend to the accused and try to break him down for the police.

Every man can be "broken." There is a point where the nervous system can take no more pain, shock, or fatigue, where it will pay any price for relief. A few minutes, a few days, or a few weeks, may be required, depending upon the individual and the torture device that is employed. Once that point has been reached the accused becomes, for the moment, putty in the hands of the police and will admit what they charge and sign what they want.

The technique of making a case through the torture route has vicious ancillary consequences. As stated in the Indian Report, ". . . the police officer is unduly impelled by the statistical test to try to make his investigation end in conviction." *Id.*, 17. Hence the temptation to bolster the case with false evidence. Hence the temptation to get pleas of guilty. The pattern is apparently the same the world over. I remember an account of a larceny trial in China in the 1920's. The accused was stretched on a wheel until he confessed. The prosecution then scurried around to find corroborating evidence.

In the Western world, these unlawful police practices have had serious consequences. Sometimes an innocent

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person has been the victim. Sometimes the person enmeshed was doubtless guilty; but the unlawful police practices so contaminated the case as to make a reversal necessary.

Historically, these ~~cruel and vicious~~ police practices were used primarily upon the poor, the weak, the uninfluential. Sometimes the victims were racial minorities; sometimes, political or religious minorities. These police practices produced reforms; and those reforms are today reflected in provisions in the American Constitution.

One is the provision in the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself." (This provision is also found in practically all the Constitutions of the States.)

Another is the command of the Eighth Amendment that no "cruel and unusual punishments" shall be inflicted.*

There are also the safeguards of the Sixth Amendment. That Amendment reflects the resolve of Americans that no man's life, liberty, or property shall be forfeited, and no man punished, except upon a "charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed." *Chambers* v. *Florida*, 309 U. S. 227, 236–237.

The Sixth Amendment is, indeed, wholly at war with the practice of the police in holding a man *incommunicado*, endowing themselves with the perquisites of a kangaroo court, meting out to the accused the punishment in the form of torture and confinement which they think he deserves.

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*For accounts of cruel punishment under Hindu law see Rankin, Background to Indian Law (1946) c. XI.

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For federal trials the rule governing confessions is quite strict, as shown by *McNabb* v. *United States*, 318 U. S. 332. In that case prisoners were interrogated intermittently for two days before being taken before a magistrate. As noted above, a federal statute requires prompt arraignment before a United States Commissioner or judicial officer. The federal officers, who held the prisoners two days for questioning, violated this statute. Whether there was a violation of the Constitution was not germane to the question before the Court. This was a federal prosecution; the trial was in a federal court; and the Supreme Court has supervisory authority over the administration of criminal justice in the federal courts. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.*, 340. The Court therefore formulated a rule of evidence: if confessions are exacted of prisoners while they are being held by the police in violation of the federal statute governing arraignments, the confession will not be allowed in evidence at the federal trial.

". . . in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding." *Id.*, 341–342.

In *Upshaw* v. *United States*, 335 U. S. 410, a prisoner was arrested on suspicion and held 30 hours at which time a confession was obtained. The aim of the federal rule on prompt arraignment was to check resort by officers to secret interrogation of persons accused of crime. The fruits of its violation would have been used to obtain a conviction had Upshaw's confession been admitted. For the officers had used the illegal detention as a device for getting enough evidence to arrest the man.

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The limits of the *McNabb* doctrine are shown by *United States* v. *Mitchell*, 322 U. S. 65, where the accused confessed promptly and spontaneously on his arrest and was thereafter illegally held for eight days before arraignment. The illegal act did not produce the confession and neither the American courts nor Congress has gone so far as to exclude from evidence a confession because it was made while the defendant was in custody of the police.

The command of the Fifth Amendment is narrower. It is, as I have said, that no person "shall be compelled in any criminal case to be a witness against himself." The wording is close to Article 20 (3) of the Indian Constitution, "No person accused of any offence shall be compelled to be a witness against himself." *

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*A retracted confession is nonetheless evidence against the accused, although concededly it has "only little value as the basis for a conviction," as the Indian Supreme Court ruled in *Kalawati* v. *Himachal Pradesh*, 16 Sup. Ct. Jour. 144, 146. The use of a retracted confession does not violate the constitutional privilege against self-incrimination. *Id.*

Section 342 of the Indian Code of Criminal Procedure provides:

"(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

"(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

"(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

"(4) No oath shall be administered to the accused."

In re Ramakrishna, 42 A. I. R. 100—the High Court of Madras held that the questioning of the accused under § 342 of the Criminal Procedure Code does not violate Article 20 (3). The court explained: "First of all . . . it is entirely a matter of option with the

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There was one school of thought that the privilege against self-incrimination extended only to testimonial compulsion in court, not to testimony forced from the accused prior to the trial. But that view does not prevail in the United States; and it was rejected by an emphatic dictum of the Supreme Court of India in *Sharma* v. *Chandra*, 41 A. I. R. 300, 304.

In the United States, a confession given the police may not be used in the subsequent trial against the defendant if it was not voluntary. Compulsion is not deemed to flow from the mere fact that the prisoner is detained by the police. There must be some additional influence or inducement, engendering either hope or fear. The slight degree of improper inducement needed to condemn the confession under the Fifth Amendment is indicated by *Bram* v. *United States*, 168 U. S. 532, the leading case on the subject.

As I have pointed out in an earlier Lecture, the guarantee of the right against self-incrimination contained in the Fifth Amendment has been held inapplicable to the States through the Due Process Clause of the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *California*, 332 U. S. 46. Those cases did not involve incriminatory statements obtained by the police after their arrest. Rather, they involved the ques-

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accused to answer or not when he is questioned under S. 342 . . . and as an oath cannot be administered to him as to a witness and his testimony cannot be put in evidence in the trial or enquiry, S. 342 is not repugnant to Cl. (3) of Article 20. Secondly, it is quite true that S. 342 (2), Cr. P. C., provides that the Court and the jury, if any, may draw such inference from the refusal of the accused to answer question or his giving false answers, as the Court or the jury thinks just. This does not mean that this is a case of virtually compelling the accused to be a witness against himself and so, as being contrary to the spirit, if not of the letter of Cl. (3) of Article 20, as has been posed . . . because the object of S. 342 is not to build up a case against the accused from his answers or non-answers but to test by the explanation furnished by the accused in another additional manner the truth of the prosecution version." *Id.*, 118–119.

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tion whether due process of law bars comment by the prosecutor on the failure of the defendant to take the witness stand at his trial. Since that comment was not outlawed, it follows *a fortiori* that confessions obtained by the police and used in state prosecutions are not protected by the self-incrimination privilege contained in the Bill of Rights.

Nevertheless, judicial statesmanship has used the Fourteenth Amendment against unconscionable and overreaching practices of the police in obtaining confessions from prisoners and using them against the accused at the trial. The leading case is *Brown* v. *Mississippi*, 297 U. S. 278, in which convictions for murder rested exclusively on confessions obtained by the defendants as a result of whippings. The methods used to procure the confessions were "revolting to the sense of justice"; and state action resulting in the conviction of men by use of such confessions ran contrary to "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.*, 286. Compulsion of testimony by torture, in other words, violates the requirements of due process contained in the Fourteenth Amendment.*

The Court has applied the rule in numerous cases to set aside judgments of conviction of state courts not only where torture was used but where other methods of coercion were employed. See particularly *Chambers* v. *Florida*, 309 U. S. 227; *White* v. *Texas*, 310 U. S. 530; *Ward* v. *Texas*, 316 U. S. 547; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ashcraft* v. *Tennessee*, 327 U. S. 274; *Malinski* v. *New York*, 324 U. S. 401; *Haley* v. *Ohio*, 332 U. S. 596; *Lee* v. *Mississippi*, 332 U. S. 742; *Watts* v. *Indiana*, 338 U. S. 49; *Harris* v. *South Carolina*, 338 U. S. 68; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Leyra* v. *Denno*, 347 U. S. 556.

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*For a holding that a second confession obtained after an earlier one had been coerced could not consistently with due process be used against the accused, see *Leyra* v. *Denno*, 347 U. S. 556. Ci. *Ashcraft* v. *Tennessee*, 327 U. S. 274; *Lyons* v. *Oklahoma*, 322 U. S. 596.

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The coercion used in these cases ranged from the whippings in *Brown* v. *Mississippi* to the "almost trance-like submission" to "a highly skilled psychiatrist," in *Leyra* v. *Denno*. *Id.*, 561.*

Many of these cases are reminiscent of an episode related by Sir James Fitzjames Stephen in *A History of the Criminal Law of England* (1883) Vol. I, p. 442, note. Sir James refers to discussions in 1872 concerning the Indian Code of Criminal Procedure. The topic was the use of torture on prisoners. He quotes a civil officer as saying, "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

When it comes to confessions used in state trials, the Court has not gone so far as to invalidate under the Due Process Clause all confessions obtained during the period of illegal detention (as determined by state law regulating the time of arraignment). A powerful case can be made out for such a rule. We know enough of police practices to know, almost for a certainty, that the use of protective custody is the occasion for the inquisition. "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magis-

*In case a question as to the voluntary character of a confession is raised, the judge ordinarily has a preliminary hearing out of the jury's presence to determine the matter. If the judge admits the confession, the defense may again offer evidence to show it was not voluntary. The jury must find the confession to be voluntary beyond a reasonable doubt.

But whenever the federal question is raised whether the confession meets the requirements of due process of law, the Supreme Court of the United States has the final say. Whatever the state court and jury may have found, the question is one on which the Supreme Court makes "an independent determination on the undisputed facts." *Malinski* v. *New York*, 324 U. S. 401, 404.

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trate. We should unequivocably condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country." *Watts* v. *Indiana*, 338 U. S. 49, 57 (concurring opinion). And see *Stroble* v. *California*, 343 U. S. 181, 203–204 (dissenting opinion); *Gallegos* v. *Nebraska*, 342 U. S. 55, 73–75 (dissenting opinion).

I note in Indian law a meticulous procedure for protecting the prisoner against confessions obtained during the period of his detention by the police. Statements to the police are excluded. Code of Criminal Procedure § 162. Any confession of a prisoner is recorded by the magistrate; and by § 164 (3) the magistrate is admonished concerning it in the following language:

"A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; . . . ."

In construing this provision the Supreme Court of India stated in *Kalawati* v. *Himachal Pradesh*, 16 Sup. Ct. Jour. 144, 146:

"A confession has to be voluntary before it can be used against a person making it, and a magistrate is bound to satisfy himself that it is being made without any inducement, threat or promise. No person accused of a crime is bound to make a confession, and if there is any compulsion or threat, it has to be ruled out as irrelevant and inadmissible."

Indian law recognizes what American law has not yet conceded—that police custody has a strong effect on confessions, that it is indeed a form of coercion. A prisoner long-detained by the police may not rid himself of that

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coercive atmosphere merely by being brought before the magistrate.

In *State* v. *Bachubha*, 41 A. I. R. 39, from the High Court of Saurashtra, it appeared that the defendant, charged with murder, had been confined by the police for some months. When first called before the magistrate to record his confession, he denied having committed the offense. The magistrate recorded the confession, being satisfied that it was a voluntary one. But the trial court nonetheless refused to admit it; and the High Court approved that action, saying there was "some doubt about the voluntary character of the confession." *Id.*, 41–42.

In *Jodha* v. *State*, 41 A. I. R. 115, from the same court, the prisoner was transferred to judicial custody twenty-nine hours before the magistrate recorded his confession. The court held that it was necessary to give the accused time "to reflect whether he should make a confession or not" (*id.*, 118); and that the time needed "to get rid of any coercive influence while in police custody and to make up his decision whether to confess or not" (*id.*, 118) turned on the circumstances of each case. The court held that the twenty-nine hours in the case was adequate, especially in light of the fact that there was no evidence that the police had employed any "coercive methods" during the period of detention.

C. *The Prosecutor.*

"It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction." So spoke the California Supreme Court in *People* v. *Wells*, 100 Cal. 459, 465, in reversing a conviction for forgery. The reason for this attitude of prosecutors was stated in 1937 by a special committee of the American Bar Association: "The Bar has always been regarded as the nursery of political careers. Lawyers have, therefore, yielded to the temptation to seek pub-

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licity for their professional efforts as a basis for careers which they hope to achieve either on the Bench or in executive or legislative office." Moreover, some prosecutors have tried to make up for the poverty of their cases by the violence of their demeanor and attitude.

Over and again our courts have held that an accused is deprived of a fair trial when the prosecution undertakes "by a side wind, to get that in as proof which is merely conjecture, and thus to work a prejudice in the mind of the Jury." (See *Berry* v. *Georgia*, 10 Ga. 511, 522); or where, in his argument to the jury, the prosecutor makes insinuations of personal knowledge which imply that a witness is a liar or engages in undignified and intemperate talk calculated to mislead the jury. See *People* v. *Ah Len*, 92 Cal. 282; *People* v. *Malkin*, 250 N. Y. 185.

For example, a Texas prosecutor made the following closing argument to the jury in a rape case:

"The eyes of Comanche County are upon you. Look at this crowd in this court room, and a crowd has been here all during this trial. The will and wish of every law-abiding citizen of Comanche County wants a verdict of death."

That was an appeal for conviction upon public sentiment, not upon the evidence. The Court of Criminal Appeals of Texas therefore set aside the conviction. *Hazzard* v. *State*, 111 Tex. Cr. Rep. 539, 15 S. W. 2d 638. What the Texas court said represents the American creed:

"Constitutional guaranties have been found necessary to protect the liberty of men from the hasty judgment of the multitude. To more effectually do this there has been written into our organic law a guaranty that the accused shall be confronted with the witnesses against him. He must and can only be convicted by testimony coming from the witness stand in open court, where he may have the privilege of cross-examination and of offering rebuttal testimony. Such a rule has been evolved from the wisdom of centuries and to ask a jury to give a death penalty because their neighbors desire it is to ask

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them to violate this fundamental right which belongs to every man." *Id.*, 542, 15 S. W. 2d 640.

The American cases are numerous in which the prosecutor has been charged with improper conduct.

The American prosecutor by and large, however, has written a good record in law enforcement. His performance cannot be judged solely by the cases where reversal is sought for misconduct. There have been instances of abuse and overreaching. And the appellate courts have been quick to correct them. The principle deducible from our cases is that while a prosecutor may strike "hard blows," he is not free to strike "foul" ones. He is there not only to see that the guilty do not escape. It is also his function to see that the innocent person, caught in the toils of the law, does not suffer.

Government is admonished under our decisions against playing an ignoble role in law enforcement. Justice Holmes put the principle in graphic terms in *Olmstead* v. *United States*, 277 U. S. 438. That case presented the question whether wire-tapping violated the Fourth Amendment, one of America's guarantees of the right of privacy. It provides:

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Officers may not enter one's home or one's office to conduct a search unless they have a warrant; and no warant shall issue except on the strict showing required.

Modern science has made it unnecessary to "enter," in the ancient sense, in order to learn what goes on inside the home or the office. A wire-tap can be attached to the telephone or, if not physically attached, placed close enough to it to pick up the conversation from the wires. Or a person lawfully inside the house or office (*e. g.*, an

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undercover man posing as a friend) may carry concealed on his body a radio transmitter, which sends the conversation to an accomplice concealed outside with a receiving set. See *On Lee* v. *United States*, 343 U. S. 747.

This problem of wire-tapping under federal law has been before the Court on several occasions. It has produced sharp divisions within the Court. But never has a majority of the Court held that wire-tapping was within the protection of the Fourth Amendment. The Court has refused to require the police and prosecutor to get a search warrant based on probable cause in order to tap a person's wire.* *Olmstead* v. *United States*, 277 U. S. 438; *Goldman* v. *United States*, 316 U. S. 129; *On Lee* v. *United States*, 343 U. S. 747; cf. *Irvine* v. *California*, 347 U. S. 128. Justices Holmes, Brandeis, Stone and Butler dissented in the *Olmstead* case, Justice Holmes saying:

"It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.*, 470.

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*Congress has regulated the matter by statute. The Act in question provides that no person shall intercept any interstate or foreign communication by wire or radio and divulge its contents without the authority of the sender; the Act also bars disclosure or use of information by one who has received it knowing that it was obtained by such interception. 47 U. S. C. § 605. Because of this statute, evidence obtained by federal agents by means of wire-tapping is not admissible in criminal trials in federal courts. See *Nardone* v. *United States*, 302 U. S. 379.

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The fruits of violations of the Constitution are not allowed as evidence in criminal prosecutions in the federal courts. The leading case is *Weeks* v. *United States*, 232 U. S. 383. There the police entered the defendant's home without a search warrant and obtained certain papers and property for use against him. At the trial, the defendant moved for a return of the papers. The motion was not granted, some of the evidence being admitted against him. This was held to be reversible error.* The Court applied a

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*As indicated in an earlier Lecture, the Court has refused to hold that the Due Process Clause of the Fourteenth Amendment made the Fourth Amendment applicable to the States (*Wolf* v. *Colorado*, 338 U. S. 25), though it has indicated that the Due Process Clause does protect "the security of one's privacy against arbitrary intrusion by the police." *Id.*, 27. Cf. *Irvine* v. *California*, 347 U. S. 128.

The Indian Constitution does not contain a restriction on searches and seizures. While there is no guarantee against searches and seizures, Article 20 (3) provides, as noted above, that "No person accused of any offense shall be compelled to be a witness against himself." It was contended that a search to obtain documents while investigating an offense is a compulsory procurement of incriminating evidence from the accused himself and therefore barred by Article 20 (3). The problem was before the Supreme Court of India in *Sharma* v. *Chandra*, 17 Sup. Ct. Jour. 428. The Court construed Article 20 (3) broadly, saying, ". . . every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20 (3) is 'to be a witness' and not to 'appear as a witness.' It follows that the protection afforded to an accused insofar as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case." *Id.*, 434.

The Court held, however, that search warrants issued by magistrates under ~~Sections 94 and 96~~ of the Criminal Procedure Code are

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sanction which penalized the use of the documents in evidence against the man whose home had been unlawfully invaded, because otherwise, ". . . the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.*, 393.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, reinforced the policy of the *Weeks* case. There, federal officers made an unlawful search of business premises, seizing certain books and papers. Copies were made and an indictment based on the information so obtained was returned. The trial court ordered the originals produced and held the defendants in contempt for failing to produce them. The Court reversed, holding that "knowledge

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not methods of compelling testimony within the meaning of Article 20 (3). "When such judicial function is interposed between the individual and the officer's authority for search, no circumvention thereby of the fundamental right is to be assumed." *Id.*, 438–439. The Court went on to say:

"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security & that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction." *Id.*, 306–307. See *In re Krishna*, 41 A. I. R. (Mad.) 993, 1001.

While India's Constitution contains no guaranty against search and seizure, the Code of Criminal Procedure sets up procedures whereby searches and seizures may be made. See §§ 51, 96, 97, 98, 99, and 165.

The Supreme Court of India held in *Chand* v. *Himachal Pradesh*, 41 A. I. R. 415, that the seizure of certain medicinal herbs by the police without following the statutory procedure was an unlawful act, entitling the owner to a return of the property. The Court relied on Articles 19 (1)(f) and 31 (1). Article 19 (1)(f) provides, "All citizens shall have the right . . . to acquire, hold and dispose of property." Article 31 (1) provides, "No person shall be deprived of his property save by authority of law."

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gained by the Government's own wrong cannot be used by it" in such a manner. *Id.*, 392.

Entrapment is another illustration of the penalty imposed on the government when the law enforcement agency plays an ignoble role. Our leading case is *Sorrells* v. *United States*, 287 U. S. 435. There a prohibition agent, capitalizing on old associations, induced the defendant, otherwise a law-abiding citizen, to procure liquor in violation of the law. The Court allowed the plea in defense of the charge. Decoys may be used to entrap criminals. But where the criminal design originates, not with the accused, but with the government agents, and the defendant by persuasion, by deceit, or by inducement is lured into the commission of a criminal act, the government may not use the fruits of that conduct of its officers against the victim.* And see *Butts* v. *United States*, 273 F. 35.

The most notorious example of the imposition of a penalty on the government when its officers play an ignoble part in law enforcement is illustrated by *Mooney* v. *Holohan*, 294 U. S. 103. Mooney was convicted of murder by a state court and sentenced to life imprisonment. In a federal *habeas corpus* proceeding, he charged that the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain the conviction. Knowledge of these facts was alleged to have been acquired too late for use at the trial.

The Court denied relief in the federal proceedings because the corrective judicial process, available in the state courts, had not been employed. It laid down, however, guiding principles covering the application of the Due Process Clause of the Fourteenth Amendment to state trials. The requirement of due process, said the Court, is not satisfied "if a State has contrived a conviction through the pretense of a trial which in truth is but

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*Cf. *Singh* v. *Vindhya Pradesh*, 17 Sup. Ct. Jour. 362, 384.

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used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Id.*, 112.

In sum, prosecutors may not use *any* means to the end of obtaining a conviction. They are officers of the court, guardians of liberty, and protectors of due process of law. They are employed to exercise a sound discretion to the end that the innocent are not convicted, the guilty are vigorously prosecuted, and only fair means are used to obtain convictions.*

When the *federal* prosecutor plays an ignoble role, the Supreme Court is alert to see that the fruits of his dishonorable conduct do not infect the trial. When the prosecutor is a *state* official, his ignoble or dishonest conduct may also infect the trial under *federal* rules of Due Process, as *Mooney* v. *Hohohan* dramatically illustrates.

D. *The Defendant.*

Today, if a person charged with a crime is asked to plead guilty or not guilty and stands mute, he is taken to plead not guilty. That was not always so. ~~Until 1772~~ a person who, in a treason or misdemeanor case, did not plead was presumed to plead guilty. He was thereupon convicted and punished. If he refused to plead in a felony case such as one involving murder or robbery, his refusal to plead brought dire consequences. In the early years, he was put in solitary confinement and given bread one

In early days

*Failure to call crucial witnesses may deprive the defendant of a fair trial. The Supreme Court of India so held in *Mohammad* v. *Hyderabad*, 16 Sup. Ct. Jour. 678, 686.

It should be noted, however, that the Indian Constitution has no provision requiring the confrontation of witnesses. The function of such a guarantee is performed by Section 353 of the Code of Criminal Procedure.

Yes

to some extent

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tnote

See Scott, Discoverie of Witchcraft and Hutchinson, Historical
y on Witchcraft for the history of witchcraft in England. The
rican story has been told by Starkey, The Devil in Massachusetts
by Miller, The Crucible.

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day and water the next, until he pleaded guilty or not guilty, or died from starvation. The bread was the "coarsest" that could be got, and the water was taken from "the next sink or puddle to the place of execution." Later on, "pressing" was used—the notorious *peine forte et dure*. The prisoner would be stretched and weights laid on him, being gradually increased until he died or agreed to plead guilty or not guilty. To hasten death a stake was often placed under him. Men were "pressed" on this continent for their refusal to plead. As the years passed, this torture was somewhat lessened—a prisoner who stood mute had his two thumbs tied together, so that the pain might compel him to plead; or he was placed in chains.

This barbarism ended in 1772 when Parliament provided, in a law applicable to America, that a prisoner who stood mute should be taken to plead guilty. Statutes 12 Geo. III, c. 20. Not until 1827 did England provide that standing mute in a criminal case was the equivalent of a plea of not guilty. Statutes 7 and 8 George IV, c. 28.

The history of the *peine forte et dure* is one chapter in our long and tortuous escape from torture and compulsion in criminal trials. See Goebel & Naughton, *Law Enforcement in Colonial New York* (1944), pp. 581–582.

Witchcraft was another ugly chapter in English and American history.

Witchcraft prosecutions flourished in England for 160 years. During that time a conservative estimate of the number who were hanged or burned is 600. The Witch Finder General—the most notorious investigator of them all—was Matthew Hopkins, a Puritan, who ruled supreme in 1645 and 1646.

An Act of Parliament imposed a death penalty on any person who "shall use practise or exercise any Witchcrafte Inchantment Charme or Sorcerie, wherebie any person shalbe killed or destroyed." Statute 1 James I, c. XII. Hopkins and his cohort, John Stearne, formed a flying squadron that went from county to county on their in-

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restigations and hearings. Usually two men and two women would be used as "searchers." Suspects were stripped and examined for marks of the devil. Then they were put cross-legged on a stool, or walked up and down, or otherwise kept awake without food for several days. Meanwhile, the imps that witches commanded were watched for, and these might appear in the form of a spider or a fly that could not be killed.

Hungry days and sleepless nights were methods of torture that produced the confessions.

A man said in a quarrel that he wished his neighbor's tongue would rot. The neighbor died of cancer and the man was convicted. An eighty-year-old pastor was trotted around a room for several nights, until he confessed he had sunk a ship, drowning fourteen sailors. A woman was convicted who "felt something come into the bed about her legges but could not finde anything."

Hopkins waxed strong, collecting fees from each community. He and Stearne probably were responsible for the hanging of 200 or more people in two years.

The hysteria of witchcraft came in wave after wave, usually following religious controversies. Two great figures thundered against it. Shortly before 1600, Reginald Scot published *Discoverie of Witchcraft*, which had little deterrent effect. Francis Hutchinson in 1718 published his *Historical Essay on Witchcraft*, which, by a devastating analysis of the trials, laid the ghost that had haunted England for so long.

In 1692 the last persons were hanged in America for witchcraft. The number arrested in 1692 exceeded 250, while those hanged numbered 19. In addition, 1 was pressed to death for refusing to plead; 2 died in prison from ill-treatment.

The story has been told by Starkey, *The Devil in Massachusetts*, and by Miller, *The Crucible*. The hunt started with fantasies of little girls which were given credence by excitable teen-agers. The "witches" tried were rich and poor, black and white. The court was com-

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posed of laymen. The theory of the trials was that the devil assumed the shape of a human and worked violence and injury on people.

The trial was before a jury. The judges were guilty of three cardinal errors. They accepted as evidence of guilt (1) an unusual excrescence on the body of the accused ("devil's mark" it was called); (2) any mischief (such as the death of a cow) which followed a quarrel between the accused and a neighbor; and (3) the appearance of the accused in the dream or fantasy of the accuser ("spectral evidence") to do harm and evil. Thus, evidence of the emotional state of the accuser became proof of the behavior and guilt of the accused.

The search for witches, encouraged by the clergy, set neighbor against neighbor. Every quarrel quickly became related to the failure of bread to rise, the falling of a brick, or the sickness of a child. Suspicion reigned supreme. People were tried in an atmosphere dominated by mob psychology.

Trial by ordeal was another dark chapter in English law. England had no monopoly on it. Manu, the ancient Hindu lawgiver, tells us about it.

"Let the judge cause a priest to swear by his veracity; a soldier, by his horse, or elephant, and his weapons; a merchant, by his kine, grain, and gold; a mechanick or servile man, by *imprecating on his own head, if he speak falsely,* all possible crimes;

"Or, *on great occasions,* let him cause the party to hold fire, or to dive under water, or severally to touch the heads of his children and wife:

"He, whom the blazing fire burns not, whom the water soon forces not up, or who meets with no speedy misfortune, must be held veracious in his testimony on oath.

"Of the sage VATSA, whom his younger *half*-brother formerly attacked, *as the son of a servile woman,* the fire, which pervades the world, burned not even a hair, by reason of his perfect veracity." Institutes of Hindu Law or Ordinances of Menu. *Id.,* 239–240.

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An appeal to the supernatural has been a method used by many peoples for proving guilt.

In England the accused, in an elaborate ecclesiastical ritual, would remove a rock from boiling water with his bare hand. The hand or arm would be bound up for three days. If at the end of that time the skin was healed, the accused was declared innocent. If he had a blister, he was guilty.

Ordeal by fire followed a similar pattern. The accused picked up a red-hot iron and carried it for three steps. His hand was then bound up and inspected the third day.

Ordeal by water had a different twist. The accused was bound hand and foot and cast in a pool. If he sank, he proved his innocence. If he floated, without swimming, he must have the devil in him.

These ordeals flourished in England for centuries, supported by the belief that God intervened on behalf of the guiltless. By 1215, the Catholic Church was done with them. In 1262, they were abolished by the King.

But wager of battle was not abolished in England until 1819. 59 Geo. III, c. 46. It gave the accused the option of resolving the controversy in battle with the accuser. The weapons used were a sword or an ax. If the accused slew his opponent, or made him call out the word "craven," or was able to fight until the stars came out, he was acquitted. If he was overcome or unable to continue, he was adjudged guilty. If the accused were a woman, child, priest, or invalid, a man was hired to do battle.

It took centuries for men to be rid of the idea that God was always on the side of him who was the stronger or had the greater skill. It took centuries to evolve the conception of the fair trial we have today. It was against a background poignant with memories of evil procedures that our Constitution was drawn.

The procedural safeguards for the protection of the accused adopted by our Constitution are numerous. Most of them are contained in the Sixth Amendment.

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One is a "speedy" trial in a criminal case. That requirement goes back to a provision of the Magna Carta that two judges should go to each county "four times a year" to hold court. I do not stop to develop the evolution of that provision into the more modern conception of a "speedy" trial. See I Holdsworth, *History of English Law*, 274–278. Suffice it to say that by the mid-thirteenth century, the King began to appoint, at frequent intervals, a commission "to deliver a gaol." This agency came to be a court or commission of general gaol delivery which was authorized to visit specified places and try to deliver every prisoner, whatever his crime. As a consequence, all persons accused of crime, whether in jail or out on bail, were brought up for trial at least twice a year. In this way the common law worked out a procedure for guaranteeing an accused a speedy trial.

The modern application of the guarantee is illustrated by *United States* v. *Fox*, 3 Mont. 512, arising in the Territory of Montana, a federal domain. The defendant was indicted for embezzlement in 1879. His trial was continued until March 1880. At that time he demanded a trial. The prosecution refused because Congress had not appropriated money to reimburse the marshal for summoning witnesses necessary to present the government's case. The federal court adjourned after continuing the case until the next term of court, which would be held in November 1880. The accused, still being in prison, made application for a writ of *habeas corpus*, asking that he be discharged from prison because he was denied a "speedy" trial, which the Bill of Rights guarantees.

The court granted the defendant the relief. It held that the prosecution had had a reasonable opportunity to prepare the case for trial and that there had been a term of court at which a trial could have been held. "The government of the United States cannot cast a man into prison and then fold its arms and refuse to prosecute." *Id.*, 520.

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The Sixth Amendment states that an accused is entitled to be tried in "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

One of the grievances in the Declaration of Independence was "transporting us beyond Seas to be tried for pretended offenses." Those who drafted our Constitution remembered the threats of the King to take John Adams, John Hancock, and other patriots to England for trial on treason charges. They knew an American patriot would stand an excellent chance before an American jury and a poor one before a London jury.

They also knew about the trial of Lord Connor Macguire. 4 How. St. Tr. 653. Lord Macguire, who lived in Ireland, was charged with high treason in 1644. It was charged that he levied war against the King, killing many Protestants. He was brought from Dublin to London for trial. He pleaded not guilty and demanded that "he might be tried and judged by his peers in Ireland." The judges ruled against him. The House of Commons, with the concurrence of the House of Lords, resolved that the court was right and urged it "to proceed speedily" according to "law and justice." That ruling doomed Lord Macguire, and he was shortly on his way to the gallows. A Dublin jury might have saved his neck. A London jury was almost certain to hang him.

As a result of Macguire's case and other like cases, the citizen in America today has the assurance that, if he is charged with a federal offense in California, he cannot be shipped out of state for trial in another jurisdiction, where the Attorney General thinks the chances for conviction are better. The Sixth Amendment takes away the opportunity for the federal prosecutor to shop around to find the jurisdiction where a conviction can most likely be obtained.

The Sixth Amendment also guarantees the accused a "public" trial. A secret trial would, indeed, be anathema to us. It would be unthinkable that in America a person

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could be spirited away, held *incommunicado*, tried in secret, and executed. The advantages of a public trial over a secret one are obvious: a witness might testify secretly to things he would not dare say openly; lawyers and judges who could operate behind closed doors might take short cuts they would not dare take publicly; the community would not have a good measure of the manner in which justice was administered if the public were excluded.

The constitutional requirement for a "public" trial did not arise out of any special grievance in English history. But the secret trial in France and Spain was known in England as a tyrannous practice of princes. It was therefore feared; and the common law consistently granted the right to a public trial.

The Court said in *In re Oliver*, 333 U. S. 257, 266, "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."

The public trial can, of course, be an ominous affair. There have been times in this country when a tense, crowded courtroom turned the trial into a theatrical performance, diverting it from a calm, dispassionate search for the truth. At other times the hostility of the crowd inside the courtroom has deprived the jury of its impartiality.

Boisterous and disorderly people should, of course, be evicted from the courtroom. Some courts have gone further and allowed exclusion of a crowd of idle loafers whose presence at a trial may be due to their morbid curiosity for indecent details. If an accused can show prejudice by reason of exclusion of members of the public, he gets a new trial. The exclusion of all of the bystanders, except the news reporters, has been soundly condemned. See *State* v. *Keeler*, 52 Mont. 205. But if the press is represented, if the defendant's lawyers, his witnesses, and some of his friends are present, and if a select group of

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the public (such as members of the Bar) are admitted, the judge may in exceptional situations exclude the balance in the interest of justice. See *Reagan* v. *United States*, 202 F. 488. A quiet, dignified courtroom is more likely to be a place of justice than one packed with people whose demeanor and attitude put the whole room on edge.

The provision of the Sixth Amendment that the accused in criminal prosecutions shall enjoy "the right . . . to be confronted with the witnesses against him" has echoes of the famous trial of Sir Walter Raleigh in 1603. 2 How. St. Tr. 1.

Sir Walter Raleigh had been a favorite of Elizabeth. But when James came to the throne, Raleigh's political fortunes waned and political rivals plotted his distruction. He was soon arrested and charged with treason. There were treasonable projects afoot, since James would not tolerate the Catholic religion in the realm. Plots were laid to kidnap him and force concessions from him. One plot was to put Lady Arabella Stuart on the throne in his place. Raleigh was charged with promoting the latter plan with Lord Cobham.

There was hardly a shred of evidence against Raleigh that was competent by modern standards. The prosecution relied mainly on depositions and letters written by Cobham. Cobham was alive and could have been produced. Raleigh asked that Cobham confront him. "Call my accuser before my face," he demanded. Raleigh knew that Cobham had retracted the confessions. Raleigh knew that they could not stand up under cross-examination.

The judges feared the same thing. So they refused to make the prosecution produce Cobham, giving as their excuse "many horse-stealers may escape, if they may not be condemned without witnesses."

Raleigh was convicted and beheaded. He went to his death without meeting his accuser face to face. Perhaps Cobham's confessions had been forced by torture. Perhaps Cobham had lied. Whatever the truth, Cobham

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never had to suffer the torment of cross-examination. The jury never had a chance to determine whether Cobham was telling the truth.

The Raleigh trial was a notorious one, long remembered. It was one of the reasons why, prior to the Federal Constitution, some of the States wrote into their constitutions provisions giving an accused in a criminal trial the right to be confronted with the witnesses against him.

The application of this guarantee of the Sixth Amendment was presented in *Kirby* v. *United States*, 174 U. S. 47, where a judgment of conviction for stealing certain federal property was made "conclusive evidence" against the receiver of the property in a subsequent prosecution of him. This was held to be a violation of the Sixth Amendment. ". . . a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial . . . ." *Id.*, 55. And see *Motes* v. *United States*, 178 U. S. 458, 474. This right of confrontation is one of the basic requirements of procedural due process of law. *In re Oliver*, 333 U. S. 257, 273. It does not, however, extend to the post-conviction procedures for determining the sentence to be imposed (see *Williams* v. *New York*, 337 U. S. 241; cf. *Solesbee* v. *Balkcom*, 339 U. S. 9) nor, in absence of prejudice, to a viewing of the scene of the crime, provided defendant is represented by counsel. See *Snyder* v. *Massachusetts*, 291 U. S. 97.

The right granted an accused by the Sixth Amendment "to have the Assistance of Counsel for his defence" has been discussed in an earlier Lecture. As noted, that right has not been deemed so fundamental by a majority of the Court as to make its denial a deprivation of due process in every case. The importance of the right is perhaps best illustrated by *Powell* v. *Alabama*, 287 U. S. 45, and *Betts* v. *Brady*, 316 U. S. 455.

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The former is the famous Scottsboro trial of seven young Negroes. Until the morning of the trial, no lawyer had been named to represent the defendants, who were both ignorant and illiterate and charged with an atrocious crime, carrying the death penalty. The lawyers named had no chance to investigate or prepare a defense. The Supreme Court reversed convictions obtained in that way, as violative of due process. The right to be heard would be, ~~in many cases~~, of little avail if it did not comprehend the right to be heard by counsel.

The Court, speaking through Justice Sutherland, said:

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*, 69.

In the *Betts* case, the Court, by a divided vote, greatly limited that doctrine. A farm hand, who demanded a lawyer because he was too poor to hire one, was put on trial for robbery and forced to defend himself. He was sentenced to eight years imprisonment. The Court concluded that even without a lawyer the accused had had a fair trial.

The *Betts* case has been severely criticized on numerous grounds, one being the objection stated in the dissent

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of Justice Black, that it "subjects innocent men to increased dangers of conviction merely because of their poverty." *Id.*, 476. A rich defendant, a defendant with friends and allies, always has counsel. The impoverished defendant, the waif, the unpopular one, may be forced to stand trial without knowing whether the charge against him is valid or what a valid defense might be.

The line between the *Powell* case and the *Betts* case is still maintained. But the liberal application of the principle of the *Powell* case to criminal prosecutions in state courts is evident from an analysis of the cases.*

In federal prosecutions, the requirement of counsel in all criminal prosecutions is mandatory. Defendant may, of course, waive the right.** And if he waives it intelligently and competently, it is binding. But if he makes no such waiver and stands trial without a counsel, the court tries him without jurisdiction. That is to say, an accused who stands trial in a federal court without benefit of counsel (absent a competent waiver), can be released on *habeas corpus*. *Johnson* v. *Zerbst*, 304 U. S. 458. The requirement of counsel, written into the Sixth Amend-

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*In the following cases, involving state prosecutions, the Supreme Court held that due process required the procurement or appointment of counsel for the defendants: *Smith* v. *O'Grady*, 312 U. S. 329 (burglary, defendant tricked into guilty plea); *Williams* v. *Kaiser*, 323 U. S. 471 (robbery with deadly weapon, plea of guilty); *Rice* v. *Olson*, 324 U. S. 786 (burglary, plea of guilty); *Marino* v. *Ragen*, 332 U. S. 561 (murder, guilty plea by youthful immigrant); *Wade* v. *Mayo*, 334 U. S. 672 (breaking and entering, inexperienced youth); *Townsend* v. *Burke*, 334 U. S. 736 (burglary and robbery, plea of guilty, error in sentencing); *Uveges* v. *Pennsylvania*, 335 U. S. 437 (burglary, plea of guilty by youth); *Gibbs* v. *Burke*, 337 U. S. 773 (larceny, trial conducted with seriously deficient defense by defendant); *Palmer* v. *Ashe*, 342 U. S. 134 (robbery, youthful defendant, deception, plea of guilty); *Chandler* v. *Fretag*, 348 U. S. 3 (denial of right to obtain counsel on habitual criminal charge carrying life sentence); *Massey* v. *Moore*, 348 U. S. 105 (robbery, trial while insane).

**For hostility to the doctrine of waiver of constitutional rights see *Khurshid* v. *Bombay*, 42 A. I. R. 123, 146.

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ment, has in other words been construed to be a jurisdictional requirement.

Thus, the lack of jurisdiction of the trial court is shown where it appears that the defendant, through the deception or coercion of the prosecutor, was induced to plead guilty to a federal offense without the advice of counsel and in ignorance of his right to such advice. *Walker* v. *Johnston*, 312 U. S. 275; *Von Moltke* v. *Gillies*, 332 U. S. 708, 720–726. In the latter case, the waiver was made after consultation with government agents. In a subsequent *habeas corpus* case challenging the jurisdiction of the trial court because of absence of counsel, the Court directed the District Court to hold hearings on whether the waiver was competently made, the Court saying:

"The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent." *Id.*, 725–726.

This right to counsel in America is to be contrasted to the same right under Indian law.* In India the guaran-

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*Article 22 (1) of the Indian Constitution provides:

"No person who is arrested . . . shall . . . be denied the right to consult, and to be defended by, a legal practitioner of his choice."

Section 340 (1) of the Criminal Procedure Code provides:

"Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader." See *Punjab* v. *Singh*, 40 A. I. R. 10; *Hajee* v. *Collector*, 41 A. I. R. (Mad) 1091.

In *Reddy* v. *Hyderabad*, 14 Sup. Ct. Jour. 320, 327, the Court stated that under the applicable statutory and court rules, while it

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tee has been held merely to assure that an accused person may engage a lawyer, if he desires. Thus, in *Singh* v. *State*, 14 S. C. J. 518, Justice Bose of the Supreme Court of India stated:

"I need hardly say that the right conferred by section 340 (1) does not extend to a right in an accused person to be provided with a lawyer by the State or by the police or by the Magistrate. That is a privilege given to him and it is his duty to ask for a lawyer if he wants to engage one and to engage one himself or get his relations to engage one for him. The only duty cast on the Magistrate is to afford him the necessary opportunity." *Id.*, 521.

In spite of these limitations, the right of counsel in India is still of great importance, as shown in *Bai* v. *State*, 41 A. I. R. 241, decided by the High Court of Rajasthan. There, counsel for the accused was denied an opportunity to interview the accused out of the hearing of the police. The court stated that counsel for the accused was entitled to consult her counsel outside the hearing of the police, and that the refusal by the police to permit such consultation was error. After reviewing the applicable provisions of Article 22 (1) of the Constitution and § 340 of the Criminal Procedure Code, the court concluded:

". . . ever since his arrest, the accused has a right to be consulted by a legal adviser of his choice and to be defended by him;

". . . in order that such consultation may be effective, interviews must be allowed to his counsel, when asked for, out of the hearing of the police though within their presence," and

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cannot be held that the trial is vitiated in every capital case where the accused in unrepresented, nevertheless, an appellate court may interfere if it is found that the accused is so handicapped by lack of legal aid that the proceedings against him "amount to negation of a fair trial."

The Supreme Court of India Rules (1950) provide in Order XXI (8) that, "In a proper case, the Court may, in its discretion, direct the engagement of an Advocate for an accused person at the cost of the Government . . . ."

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". . . such a right must of course not be abused and must be granted subject to reasonable restrictions as to time and convenience of the police authorities, no less than that of the party seeking the interview.

"It must be clearly understood, however, that the police must not in any way obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right." *Id.*, 243.

In America, also, the requirement of counsel is not necessarily satisfied by the mere fact of representation. It is effective representation that the Constitution requires. This does not mean that a constitutional question is presented by the fact that the defendant had a poor lawyer, that his counsel failed to raise points an alert lawyer would have raised, that if the defendant had the best criminal lawyer in town he might have been acquitted. Effective representation means in America, as in India, the opportunity for consultation between attorney and client and time to prepare a defense.* Thus, in *Von*

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*Effective representation by counsel is also required in the more serious prosecutions in the state courts. See *House* v. *Mayo*, 324 U. S. 42, where the defendant had a lawyer, asked to see him, but was refused the opportunity; *Hawk* v. *Olson*, 326 U. S. 271, where the defendant was denied opportunity to consult with counsel in the critical period between his arraignment and the impaneling of the jury. The Court ruled in the latter case that "denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment." *Id.*, 278.

The States are generous in their attitude toward requirement of counsel in criminal cases. Newman, *The Law of Civil Rights and Civil Liberties* (1949), summarizes the state requirements as follows:

"Statutes requiring that indigent defendants in noncapital as well as capital criminal cases be provided with counsel on request exist in 25 states—Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington and Wyoming. Georgia and Kentucky require appointment of counsel in all criminal cases by constitutional amendment. In Connecticut, Florida, Indiana, Michigan, Pennsylvania, Virginia, West Virginia and

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Moltke v. *Gillies*, 332 U. S. 708, 722, a momentary appointment of a lawyer for arraignment was said to be a "hollow compliance with the mandate of the Constitution." *Id.*, 723. Justice Black, speaking for four Justices, observed in that case:

"It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. . . . This duty cannot be discharged as though it were a mere procedural formality. . . . This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime." *Id.*, 722–723.

Effective representation by counsel also means that the lawyer appointed for an accused should be free of conflicting interests and in a position to give the accused wholehearted representation. Where the trial judge is on notice of the likelihood of a conflicting interest of the lawyer he appointed to represent the accused, a new trial will be ordered in the absence, of course, of a waiver. *Glasser* v. *United States*, 315 U. S. 60, 76.

The fact that the accused may tell the judge that he knows he has a right to counsel and desires to waive it is not enough. The judge's responsibility is not at an end.

Wisconsin, court decisions have established the requirement that in all felonies or criminal cases punishable by imprisonment in a penitentiary or by imprisonment for several years, indigent defendants must be provided with counsel on request." *Id.*, 70.

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As Justice Black stated in *Von Moltke* v. *Gillies*, 332 U. S. 708:

"To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id.*, 724.

E. *The Jury.*

A classic statement of the place of the jury in American jurisprudence was made by Justice Sam. F. Miller of the Supreme Court in an article written in 1887. *The System of Trial by Jury*, 21 Amer. L. Rev. 859. As previously noted, the Seventh Amendment gives a right to trial by jury in federal courts in all suits at common law where the value in controversy exceeds twenty dollars. See *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654. The Fifth Amendment requires that all federal prosecutions (except designated military trials) be founded on a presentment or indictment of a grand jury. And the right to trial by jury is also extended to all federal prosecutions by Article III, Section 2 and by the Sixth Amendment.* As Justice Miller noted, "The reverence and respect for this system of judicial trial was at its height when the constitution of the United States was framed . . . ."

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*The jury required by the Constitution for all federal prosecutions is one composed of twelve men, neither more nor less, who are under the superintendence of a judge having power to instruct them on the law and advise them respecting the facts, and whose verdict must be unanimous. *Patton* v. *United States*, 281 U. S. 276, 288.

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Id., 859. The jury system was indeed in force in America in the early days; and the local juries often refused to convict, thus placing a brake on the plans of the Royal Governors. The British often concluded there was no safety in entrusting the trial of offenses involving unpopular laws, to the local American juries.

In Parliament, the American jury system was criticized: "To these men offenders know how to apply; and when any riot happens between the military power and the people of the town, the jury, being taken principally out of that town, the power of life and death of the offender is lodged in those who are offended."

The more the British challenged the jury system, the more the Americans defended it. It was, indeed, an important part of our home-rule. It served as a potent check on arbitrary power.

The jury was a sturdy institution on the North American continent. It waxed strong, in the tradition of the jury that refused to convict William Penn in London in 1670.

William Penn, the Quaker, had been tried for preaching in the Grace Church Street of London, so as to cause a great "concourse and tumult" of people and a "great disturbance" of the peace. 6 How. St. Tr. 951.

The jury found him guilty of speaking, not of breaching the peace. The jury, though reprimanded by the court and sent back for further deliberations, returned the same verdict. The court thereupon ordered the jury kept all night without food, drink, fire, or chamber pots. The next day the jury returned the same verdict. Once more the court locked the jury up for the rest of that day and the following night. The next day the jury returned a verdict of *not guilty*. The court immediately fined the jurymen forty marks each and had them locked up in Newgate until their fines were paid.

The jurymen were, however, shortly released on writs of *habeas corpus*. Chief Justice Vaughan issued the writs, holding that on questions of fact the jury had the final say. Thus, the independence of the jury was established.

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A citizen became entitled to be tried by his fellow citizens, not by a judge. The jury system became a bulwark of free men, rather than a coercive instrument of the powers-that-be.

The firmness with which the jury system was deeply entrenched in American jurisprudence prior to the adoption of the Constitution is indicated by *Bayard* v. *Singleton*, 1 Martin (N. Carolina) 48. During the American Revolution, North Carolina passed a law confiscating lands held by those sympathetic with the British cause and providing that if one who purchased the forfeited lands from the State were sued, the courts should dismiss the action.

The North Carolina court held that the legislature could not finally determine that the buyer of the confiscated land had good title.

"Every citizen," it said, "had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever." *Id.*

Historically, the jury performed an important political function as related by Willis, *Juries and Judicial Review*, 3 Western Political Quarterly 65. At an early date the jury made a bid for determining the question of the constitutionality of a law. In *The Trial of the Seven Bishops*, 12 How. St. Tr. 183, the jury, indeed, seems to have exercised that power. The same power was sought and denied in the early American case of *United States* v. *Callender*, 25 Fed. Cas. 239. Today juries in our federal courts consider only issues of fact, not questions of law.

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Sparf & Hansen v. *United States*, 156 U. S. 51. But the residual political function still performed by the American jury is seen in the provisions of a few state constitutions that the jury shall be the judge both of the law and of the facts in criminal cases and in the common rule of the libel law that the jury passes not only upon the fact of publication but also on whether the publication is libelous. In an analogous case where a jury was passing on the question whether a given publication was ~~obscence~~ obscene, Judge Learned Hand commented that the jury's verdict was "really a small bit of legislation *ad hoc*." *United States* v. *Levine*, 83 F. 2d 156, 157.

The right to a trial by jury in a court of justice is deep in the American tradition, whether life, liberty, or property is at stake.*

I do not stop to consider the various objections raised to the jury system, especially in civil cases. It is sufficient to say that in spite of its weaknesses, it has more proponents than critics in the United States, even in civil cases. And in criminal cases it is, of course, an indispensable right.

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*The Indian Constitution does not contain a guarantee of jury trial either in criminal or civil cases. See *Dhirendra* v. *Superintendent*, 17 Sup. Ct. Jour. 582, 586. No provision is made in the Code of Civil Procedure for jury trials. The Criminal Procedure Code, however, provides for jury trial in certain instances. Section 267 of the Code provides: "All trials under this Chapter before a High Court shall be by jury . . . ." Article 268 provides that "All trials before a Court of Session shall be either by jury, or with the aid of assessors." It therefore seems that the jury plays an important, though not indispensable role, in Indian criminal justice.

The jury in a criminal case, however, has an independent role and function to perform, free of interference by the judge. The Supreme Court of India summarized that role in *Hayatalli* v. *Bombay*, 17 Sup. Ct. Jour. 90, 94, as follows:

"If the facts and circumstances of the case are such that a reasonable body of men could arrive at the one conclusion or the other, it is not competent to the Sessions Judge or the High Court to substitute their verdict in place of the verdict which has been given by the jury. The jury are the sole judges of the facts and it is the

** insert from p. 53.

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A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision

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right of the accused to have the benefit of the verdict of the jury. Even if the Sessions Judge or the High Court would if left to themselves have arrived at a different verdict it is not competent to the Sessions Judge to make a reference nor the High Court to accept the same and substitute their own verdict for the verdict of the jury provided the verdict was such as could be arrived at by a reasonable body of men on the facts and circumstances of the case."

Justice Miller noted in 21 Amer. L. Rev. 859, 865–866:

"In this class of cases there is no personal controversy between one man and the other, but the government of the country, undertaking for the general good of the community to enforce the penalties prescribed by law for offenses against the general welfare, brings all its power, its paid officers, the funds of its treasury, and the common sentiment of the community to bear against a single individual charged with a crime. The disproportion of means to sustain the respective sides of such a controversy is very obvious, and has long been felt. The heaviness and severity of the penalty, the impossibility of making reparation if the verdict and judgment of the court against the accused is erroneous, have infused into the spirit of the English law the general proposition that a defendant under such circumstances should be dealt with in such a manner as to secure all his rights and protect him from possible injustice. This view is often expressed in charges of the court to the jury, which, though not strictly law, have been made the rule of action for juries in an immense number of cases,—that it is better that nine guilty men should escape than that one innocent man should be punished.

"In accordance with this general proposition, it is my opinion that the principle of the jury system which requires an unanimity in the jury to make valid its verdict in criminal cases, is a sound one. I believe that no man should be rendered infamous by a judgment of a court, or punished in any other manner under a penal statute, unless twelve men are satisfied that he is guilty of the matter charged against him. As all judicial punishment is rather intended as an admonition for the suppression of crime, and to prevent the commission of like offenses in future, than as a retribution for the one on trial, it is wise that the community should have that confidence that the man so punished for its benefit was guilty, which arises from the concurrence of the opinion of twelve good and lawful jurors, and that no man should be convicted where even one juror has a reasonable doubt of his guilt."

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and melts away. It is not present the next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do.

I have noted in an earlier Lecture that a presentment or indictment by a grand jury was not a requirement of due process of law in a state criminal trial (*Hurtado* v. *California*, 110 U. S. 516) and that trial by a jury of less than twelve (for offenses not capital) did not violate due process.* *Maxwell* v. *Dow*, 176 U. S. 581. State trials in those respects are not under the compulsion of the Bill of Rights. States can use the information rather than the indictment.** States can dispense with the jury in lesser criminal cases; and they need not have the traditional twelve in non-capital cases. While some States have dispensed with the indictment, substituting the information instead, they persevere in the use of petit juries. Thus in all the States trial by jury is required in felony cases; and in all but four States, twelve jurors are required in felony cases.

There are many aspects of the jury system that have a bearing on the problem of the fair trial. I am concerned here, however, only with the major phases of the jury system, involving constitutional rights. I pass by such collateral questions as involve the disqualification of the jurors because of bias or prejudice and the power of courts to make rules governing those problems. See *Reynolds* v.

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*In *Hallinger* v. *Davis*, 146 U. S. 314, the Court upheld a state procedure whereby an accused who pleaded guilty to murder thereby waived his right to a jury trial insofar as the degree of murder was concerned.

**By 1942, about half the States were using prosecution by information at least in some cases. Some States that permit the use of the information still require the traditional grand jury indictment in capital cases.

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United States, 98 U. S. 145; *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Wood*, 299 U. S. 123; *Frazier* v. *United States*, 335 U. S. 497. I mention only in passing *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, a personal injury suit against a railroad. The Court in that case, exercising its power of supervision over the federal judicial system, set a standard for jury selection. Congress has set some requirements for federal juries (28 U. S. C. §§ 1861, 1863, 1864, 1865, 1869); but it allows the qualifications and exemptions of those jurors to be determined by the laws of the State where the federal court is located.* 28 U. S. C. § 1861. In the *Thiel* case, neither the Federal Government nor the State where the federal court was located exempted wage earners from jury duty. The question was whether wholesale exclusion from the jury lists of all persons who work for a daily wage was proper. The Court in the *Thiel* case held that the wholesale exclusion of wage earners from federal juries was improper, that a jury should be "drawn from a cross-section of the community." *Id.*, 220. The Court, speaking through Justice Murphy, said:

"This does not mean, of course, that every jury must contain representatives of all the economic, social, reli-

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*The qualifications for jurors vary from State to State. In New York the qualifications are described in *Fay* v. *New York*, 332 U. S. 261, 266–267, as follows:

"To qualify as a juror, a person must be an American citizen and a resident of the county; not less than 21 nor more than 70 years old; the owner or spouse of an owner of property of the value of $250; in possession of his or her natural faculties and not infirm or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude; intelligent; of sound mind and good character; well-informed; able to read and write the English language understandingly. From those qualified the following classes are exempt from service: clergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Naval Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, sub-editors, reporters and copy readers.

"Women are equally qualified with men, but as they also are granted exemption, a woman drawn may serve or not, as she chooses."

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gious, racial, political and geographical groups of the community; * frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Id.*, 220.

The *Thiel* case was not a constitutional decision. It involved only a standard for jury selection applicable to federal courts as a matter of judicial rule-making. But the question presented in *Thiel* assumed constitutional dignity in other cases which shortly followed. These were the "blue ribbon" jury cases from New York. *Fay* v. *New York*, 332 U. S. 261; *Moore* v. *New York*, 333 U. S. 565.

The "blue ribbon" jury is a special jury selected from the general panel by the county clerk, after each has appeared personally and testified under oath as to his qualifications and fitness. N. Y. Judiciary Law, § 749 – a a 3. The "blue ribbon" jury is part of the regular machinery of trial in counties of New York having one million or more inhabitants. The trial judge may order trial by special jury on application of either party. It has been used in New York in important cases such as murder and robbery. There was evidence that these special juries were more prone to convict than the general panel.** There was also evidence that while professional persons,

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*The fact that no wage earner was on the jury in the *Thiel* case was immaterial. *Ruthenberg* v. *United States*, 245 U. S. 480.

**That was the finding in the Fourth Annual Report of the Judicial Council of the State of New York (1938) 46. In homicide cases, special juries in 1933 and 1934 convicted in 83 per cent and 82 per cent of the cases, while ordinary juries in those cases convicted in 43 per cent and 37 per cent respectively.

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semi-professional persons, proprietors, managers, clerical workers and salesmen were represented on these special juries, there were few representatives of craftsmen and foremen on them, and none of operatives, service workers, laborers, and farmers. The Court, however, in five-to-four decisions refused to hold there had been discrimination in the selection of these "blue ribbon" juries or that they were unconstitutional under the Due Process Clause of the Fourteenth Amendment. But Justice Murphy made out a strong case in his dissent in the *Fay* case that the "blue ribbon" jury contained "a very subtle and sophisticated form of discrimination," resulting in a denial of equal protection to those who are tried by "blue ribbon" juries. 332 U. S. 299. As ~~Justice Murphy~~ said:

"There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people." *Id.*, 299–300.

Women are qualified for jury duty in most of the States; but even when qualified, they are often exempt.* The Court in *Fay* v. *New York*, 332 U. S. 261, 289–290,

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§In 1898 the State of Utah established a precedent by allowing women to serve on juries under certain conditions. At the present time, forty-four of the States permit women to serve on juries. They are barred by law from jury duty in four States. Even where women are permitted to serve, however, some twenty States permit them to decline to serve on grounds of sex.

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ruled that the absence of women from jury panels created no constitutional infirmity.

Systematic exclusion of women from juries in federal trials is reversible error, as held in *Ballard* v. *United States*, 329 U. S. 187. The exclusion of women from federal juries, like the exclusion of an economic or social class, was condemned in the *Ballard* case, not on constitutional grounds, but in the interests of the administration of justice. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.*, 195. The Court as supervisor of the federal system established that rule.

The constitutional right of women to jury duty has lagged behind that of racial groups. Women, of course, have the right to vote guaranteed by the Nineteenth Amendment. Negroes and other groups have that right by the Fifteenth Amendment. And the equal protection of the laws guaranteed to every "person" makes no distinction favoring a racial group over women. Yet constitutional protection against discrimination for jury duty, which has been denied women, has been consistently accorded racial groups.

America, as I have said, is a nation of many races. But the guarantee of a fair trial carries no promise that the defendant will have a member of his own race on the jury that tries him. *Virginia* v. *Rives*, 100 U. S. 313, 335. It is not their absence from the panel that is fatal. The fatal circumstance is discrimination. This protection of the jury system extends to the grand jury that makes the charge against the defendant as well as to the petit jury that tries him. *Hill* v. *Texas*, 316 U. S. 400; *Cassell* v. *Texas*, 339 U. S. 282.

Members of a race might, of course, be regularly excluded for lack of qualifications, measured, for example, by education. That is not the exclusion condemned by the Fourteenth Amendment.

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Nor does the protection of the jury system against racial discrimination mean that each jury must be selected with an eye to proportional representation of all races that live in a community upon the jury. *Akins* v. *Texas*, 325 U. S. 398, 403. The condemned discrimination is systematic exclusion of members of the race from the jury lists solely on account of race or color. *Pierre* v. *Louisiana*, 306 U. S. 354; *Smith* v. *Texas*, 311 U. S. 128. For example, where literate members of the race reside in the county but the jury lists have no members of that race on it year after year, a *prima facie* showing of discrimination is made out. For it will not be presumed that chance or accident was the cause of their continuous omission from the lists. *Hill* v. *Texas*, 316 U. S. 400; *Avery* v. *Georgia*, 345 U. S. 559. As stated in *Patton* v. *Mississippi*, 332 U. S. 463, 469: "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

This constitutional rule has been applied most often in cases involving trials of Negroes. But it is not designed for their benefit alone. It extends as well to other racial groups and was recently applied in *Hernandez* v. *Texas*, 347 U. S. 475, where a Mexican was convicted of murder and sentenced to life. It was shown that Mexicans were systematically discriminated against in drawing grand juries and petit juries in this particular county. The conviction of the Mexican was therefore set aside, the Court saying through Chief Justice Warren:

"Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a

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community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro." *Id.*, 478.

Summary.

Sir Ivor Jennings stated in *Some Characteristics of the Indian Constitution* (1953):

"There are times when the Bill of Rights in the United States Constitution protects the poor and the lowly, though usually only when some national organization provides the funds for expensive litigation." *Id.*, 49.

One cannot study the American cases touching the requirements of a fair trial without concluding that Sir Ivor's observations give a jaundiced view of our judicial system. A few of the cases I have mentioned in this and other Lectures are instances of the *cause celebre*. But that is not the usual case. The run of the cases involve unheard-of defendants, some without lawyers. Many are indeed paupers, who reach the Supreme Court under our *in forma pauperis* procedure, which I described in an earlier Lecture.* They come from all levels of our social

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*The American *in forma pauperis* procedure is governed by 28 U. S. C. § 1915, which provides:

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

"(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on

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strata. They do not involve the wealthy or the powerful. Neither are they characters in dramatized versions of lawsuits which have reached the headlines through organized propaganda. Rather, they are the cases of the

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appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

"(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

"(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

"(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States."

The Court has been liberal in giving effect to the spirit of these provisions. Thus, in *Adkins* v. *DuPont Co.*, 335 U. S. 331, the Court stated:

"We cannot agree . . . that one must be absolutely destitute to enjoy the benefit of the statute . . . . To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. . . . Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution." *Id.*, 339–340. See also: *Sentner* v. *United States*, 348 U. S. 935.

As respects the *in forma pauperis* procedure in India, The Supreme Court of India Rules (1950), Order XIV states in part:

"1. A petition for special leave to appeal as a pauper shall be made to the Court.

"2. . . . every such petition shall be accompanied by an affidavit from the petitioner stating that he is not entitled to property worth Rs. 100/—other than his necessary wearing apparel and his interest in the subject-matter of the intended appeal, and that he is unable

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poor and the lowly. And the composite picture they present shows, I think, the great achievement of the Court in making Equal Justice Under Law—carved in marble over our portico—a living force in American life.

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to provide sureties and pay court fees, and also by a certificate of counsel that the petitioner has reasonable ground of appeal.

"3. Where a petitioner obtains special leave of the Court to appeal *in forma pauperis*, he shall not be required to pay court fees or to lodge security for the costs of the respondent.

"10. No appeal begun or carried on by a pauper appellant shall be compromised or discontinued without the leave of the Court."

A proviso to Order XXI on Criminal Appeals states that "in criminal proceedings no security for costs shall be required to be deposited, and no Court-fee, process fee, or search fee shall be charged, and no copying charges shall be made except for copies other than the first, to any party to the proceedings."

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TAGORE LECTURES

XI

Equal Protection

On March 18, 1922, Gandhi was tried at Shahi Bag for preaching disloyalty towards and disaffection from the British Government then in control of India. Gandhi quickly pleaded guilty to the charge, and before a six-year term of imprisonment was imposed, made one of the most moving statements on equal protection to be found in the law books. He said *inter alia:*

"The law itself in this country has been used to serve the foreign exploiter. My unbiased examinations of the Punjab Martial Law cases has led me to believe that at least ninety-five per cent of convictions were wholly bad. My experience of political cases in India leads me to the conclusion that in nine out of ten the condemned men were totally innocent. Their crime consisted in the love of their country. In ninety-nine cases out of a hundred justice has been denied to Indians as against Europeans in the courts of India. This is not an exaggerated picture. It is the experience of almost every Indian who has had anything to do with such cases. In my opinion, the administration of the law is thus prostituted consciously or unconsciously for the benefit of the exploiter."

That feeling of inequality before the law under the colonial regime apparently burned itself deeply into Indian consciousness.* For the Indian Constitution has

*Balbir Sahai in his interesting article *Criminal Law and Justice in India Before Indian Penal Code of 1860*, 15 Sup. Ct. Jour. 49, 57,

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several provisions touching on the problem. Article 14 declares in general terms, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Article 15 (1) goes on to prohibit discrimination by the State against a citizen "on grounds only of religion, race, caste, sex, place of birth or any of them." Article 16 (1) makes explicit that "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." Article 17 abolishes "untouchability" and forbids its practice "in any form." We shall see how the Indian courts have construed and applied these provisions. We shall see how closely parallel many of the American and Indian decisions are in this field. Our Constitution contains no Equal Protection Clause in the Fifth Amendment.* As we have seen, it does have one in the Fourteenth Amendment.

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emphasizes the lack of equal protection under the ancient Hindu criminal law:

"The main thing in Hindu Criminal Law is that the gravity or the heinousness of the crime is related to the superior or inferior position of the injured person as compared with the wrongdoer. The protection given to the Brahmins is paramount. The King will never kill a Brahmin, it does not matter he is convicted of all possible crimes. The Brahmin was at the most asked to banish the realm but

"'with all his property secure and his body unhurt.'

"According to Manu, the ancient Hindu Law giver, 'no greater crime is known on earth than slaying a Brahmin, and the King therefore must not even form in his mind an idea of killing a priest.'

". . . Hindu Criminal Law is a system of despotism and priestcraft. . . . It does not put all men on equal footing in the eyes of law and as such punishments are partial."

And see Rankin, Background to Indian Law (1946) c. XI.

*While the Fifth Amendment contains no Equal Protection Clause, federal laws may be so grossly discriminating as to violate the Due Process Clause of the Fifth Amendment. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585; *Currin* v. *Wallace*, 306 U. S. 1, 14; *Detroit Bank* v. *United States*, 317 U. S. 329, 337–338; *Bolling* v. *Sharpe*, 347 U. S. 497, 499.

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The problems of equal protection in the constitutional sense were put in perspective by Justice McKenna who wrote in *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70, "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. . . . What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review."

When one draws a line, he makes a distinction that may be fair in most cases, yet arbitrary in some. A line drawn with reference to the average case on each side of the line may seem capricious when cases close to the line are considered. If that inequality cannot be tolerated, then the legislative branch is under heavy shackles. For one chief task of lawmakers is to make classifications: graduating taxes according to income, regulating business according to size, protecting people according to age, requiring special health regulations for particular communities, reserving certain lands for specified purposes, restricting land holdings to maximum acreages, requiring some equipment to have safety devices, barring trucks of specified weights from the highways, and so on.

There may even be a need to make a regulation based on race, the source of the most invidious discriminations man has made. Experience shows that liquor has a devastating effect on the North American Indian and Eskimo. It is, therefore, commonly provided in the United States and Canada that no liquor should be sold to those races. Other regulations based on race may likewise be justified by reason of the special traits of those races, such, for example, as their susceptibility to particular diseases.

Racial discrimination usually is the most pernicious of all and the easiest to detect. For most classifications based on race reflect an aim to suppress a people, or deny them benefits which other members of the com-

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munity enjoy. Yet some discriminatory practices may be concealed and difficult to establish. In other cases, what at first blush may seem to be an invidious discrimination may on analysis be found to have plausible grounds justifying it. The question of what is arbitrary and capricious is an elusive matter when it comes to passing on the legality of a classification. Generalizations are impossible. Only the case by case approach is helpful. That was the view of the Supreme Court of India in *Bajoria* v. *West Bengal*, 16 Sup. Ct. Jour. 580. That is also the creed of the American courts.

A. *Special Legal Procedures.*

There is no federal constitutional requirement that a State of the United States allow an appeal from its trial courts, whether civil or criminal. A State could make the judgments of its trial courts final. Yet, if a State allows some appeals, it may not make an invidious discrimination. It might, of course, allow appeals only where the amount in controversy exceeded a certain amount, or where felonies but not misdemeanors were involved. Yet it would be unconstitutional to allow appeals to Caucasians but not to Malays, to the rich but not to the poor, to people of one religion but not to those of another, to people of good character but not to those with criminal records. Our leading case is *Cochran* v. *Kansas*, 316 U. S. 255, where the charge was that prison officials impounded a prisoner's appeal papers and so frustrated his appeal. The Court held that a State which permitted an appeal in that type of case could not withhold it from one prisoner and still comport with the standards of equal protection.

Mohta & Co. v. *Sastri*, 41 A. I. R. 545, is a comparable decision by the Indian Supreme Court. By an Act of the Central Government, one group of income tax evaders was allowed to appeal from the factual determinations of the administrative agency, while another had their fate on factual issues finally determined by the agency itself. Moreover, the former would have the right to inspect the

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record, while the latter would not. And the administrative agency determined which taxpayers were in which group. The Act was unanimously held to be a "piece of discriminatory legislation," which offended the equal protection guaranty of Article 14 of the Constitution.

Dhirendra v. *Superintendent*, 17 Sup. Ct. Jour. 582, 587, held that some individuals may not be denied the right to jury trial, while others committing similar offenses are granted the right. And see *Meenakshi Mills* v. *Sastri*, 42 A. I. R. 13.

Ameerunnissa v. *Mahboob*, 16 Sup. Ct. Jour. 61, presented discrimination in a form as raw and primitive as that in the *Cochran* and *Sastri* cases. There was a long-drawn-out contest over the estate of Nawab Waliuddowla of Hyderabad. There were many claimants, including two women, claiming to be wives, and their children. An Act was passed by Hyderabad, eliminating those claimants from the contest, on the ground that the two women had not been lawfully wedded to the late Nawab. The Supreme Court held unanimously that the Act violated the equal protection guaranty of Article 14 of the Constitution. The Court said:

"The dispute regarding succession to the estate of the Nawab was a legal dispute pure and simple and without determination of the points in issue by a properly constituted judicial tribunal a legislation based upon the report of a non-judicial authority and made applicable to specific individuals, who are deprived thereby of valuable rights which are enjoyed by all other persons occupying the same position as themselves does, in our opinion, plainly come within the constitutional inhibition of Article 14." *Id.*, 67.

When we leave cases of the clarity of the *Cochran*, *Sastri*, *Dhirendra*, and *Begum* cases, we enter a vast and vague penumbra.*

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*Cf. *National Union* v. *Arnold*, 348 U. S. 37, where a state court dismissed an appeal in a civil suit because appellant was in contempt of a supplementary order in the litigation.

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Maryland allowed evidence procured by illegal search or seizure to be used in prosecutions in Anne Arundel County for certain gambling misdemeanors, but not in like prosecutions in other counties. This rule of evidence was sustained against the charge of violation of the Equal Protection Clause in *Salsburg* v. *Maryland*, 346 U. S. 545. The Court held, first, that rules of evidence "being procedural in their nature, are peculiarly discretionary with the law-making authority" (*id.*, 550); second, that the Equal Protection Clause "relates to equality between persons as such rather than between areas" (*id.*, 551); and third, that Anne Arundel County presented peculiar problems of law enforcement, since gambling operations in its rural areas were more difficult to enforce than in other areas. *Id.*, 553, 554.

The Indian courts, like the American courts, start off with a presumption of constitutionality. See *Rawat* v. *Saurashtra*, 15 Sup. Ct. Jour. 168. The *Rawat* case in India, like the *Salsburg* case in the States, presented special law enforcement problems in certain regions of a State. There were certain areas in Saurashtra where "looting, robbery, dacoity, nose-cutting and murder by marauding gangs of dacoits" had increased. *Id.*, 172. The law under review was passed to combat that regional crime wave. The law did five things: (1) it established special courts in these areas to try those crimes; (2) it abolished trial by jury (which is not guaranteed by the Indian Constitution) and the use of assessors (advisors to the courts) in these special tribunals; (3) it abolished the inquiry before commitment allowed in other prosecutions; (4) it reduced the records in these cases by providing only a memorandum of the substance of the evidence; and (5) it curtailed the time in which an appeal could be taken.

The Indian Supreme Court sustained this law in a four-to-three decision. The majority rested on the basic ground that the law was a measure designed to deal with an acute area problem, similar to that in *Salsburg* v.

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Maryland, 346 U. S. 545. Cf. *Gopalan* v. *Madhya Pradesh*, 17 Sup. Ct. Jour. 534; *Jata* v. *Bengal*, 42 A. I. R. 138.

The majority in the *Rawat* case did not repudiate the earlier decision of the Indian Supreme Court in *West Bengal* v. *Sarkar*, 15 Sup. Ct. Jour. 55. In that case, the state government laid down a procedure less advantageous to the accused than the ordinary procedure; and it made the new procedure applicable to such persons and such offenses as the executive branch should determine. That law gave a choice to the prosecutor which was undefined; it allowed him to create a disadvantaged class of people. As stated by Justice Mahajan, "It is open under this Act for the Provincial government to direct that a case of dacoity with firearms and accompanied by murder, where the persons killed are Europeans, be tried by the Special Court, while exactly similar cases where the persons killed are Indians may be tried under the procedure of the Code." *Id.*, 71. There was no "rational justification" for the difference in treatment between the two classes of cases. As stated by Justice Mukherjea, ". . . the difference in the treatment rests here solely on arbitrary selection by the State Government." *Id.*, 79.

Yet as the dissent in the *Rawat* case pointed out, the area-defense theory of the law in that case left unanswered one objection noted by Justice Mahajan:

"Section 11 of the Ordinance, like section 5 (1) of the West Bengal Act, suggests no reasonable basis or classification either in respect of offences or in respect of cases. It has laid down no measure for the grouping either of persons or of cases or of offences by which measure these groups could be distinguished from those outside the purview of the special Act. The State Government can choose a case of a person similarly situate and hand it over to the special tribunal and leave the case of another person in the same circumstances to be tried by the pro-

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cedure laid down in the Criminal Procedure Code." *Id.*, 177.

The answer to that objection is doubtless the one given by Chief Justice Mukherjea (*id.*, 185), that while in some cases the law might contain the vice of lack of equal protection, in the *Rawat* case the crimes were murder and dacoity and they could not be treated in different ways depending on the prosecutor's choice. The appellant, therefore, lacked standing to raise the point. Cf. *Razvi* v. *Hyderabad*, 16 Sup. Ct. Jour. 151.

Bajoria v. *West Bengal*, 16 Sup. Ct. Jour. 580, put to rest some of the questions left unanswered by the *Rawat* case. A West Bengal law was passed authorizing the creation of special courts to hear criminal cases involving misappropriation of government property growing out of the post-war liquidation of agencies distributing essential supplies. Cases tried under this Act were not tried by a jury, as otherwise they would be. Cases tried by these special courts carried additional penalties. Moreover, the government could route a case under the new Act or prosecute it in regular channels, as it chose. Justice Bose dissented, saying, ". . . we are opening a dangerous door and paving a doubtful road." *Id.*, 592. In his view, since the legislature could not separate the two groups of cases and put one at a greater disadvantage than the other, neither could the agency of the government to which the power was delegated. The answer of the court, speaking through Chief Justice Sastri, was as follows:

". . . the discretion to make the selection is a guided and controlled discretion and not an absolute or unfettered one and is equally liable to be abused, but as has been pointed out, if it be shown in any given case that the discretion has been exercised in disregard of the standard or contrary to the declared policy and object of the legislation, such exercise could be challenged and annulled

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under Article 14 which includes within its purview both executive and legislative acts." *Id.*, 589.*

The Indian cases involving special trial procedure raise problems somewhat akin to the American cases involving the use of the "Blue Ribbon" jury in some criminal prosecutions, a problem which I discussed in ~~a prior~~ Lecture. Each provides special procedures to expedite the functioning of the machinery of criminal justice in certain classes of cases. Each has inherent in it grave and serious dangers to the liberty of the citizen. A prosecutor, who ~~can~~ may choose the procedure he prefers, can put one citizen at a disadvantage that the others, who allegedly committed the same crime, do not suffer. That power is a device that can cloak the most invidious discrimination. The Fourth Annual Report of the Judicial Council of the State of New York (1938), which urged abolition of the special "Blue Ribbon" jury, stated:

Choudhry v. *Bihar*, 42 A. I. R. 191, decided by the Supreme Court, involved a statutory provision which permitted certain States to vest jurisdiction in an additional court to try non-capital offenses under a procedure that was regarded as less favorable to the accused, than that in the other tribunal exercising concurrent jurisdiction in such cases. In upholding the statute as against a claim that it could lead to discrimination by resort to one or the other court as the Government chose, the Court pointed out that, under the applicable provisions, the final decision as to which court would try the matter was up to the courts, which could transfer cases between themselves, and did not depend on administrative decision alone.

The Court said:

"The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination." *Id.*, 195.

It is clear that the court could remove a discrimination against one convicted under the law, if he were tried under the harsh procedure by reason of his race or his religion. But it is not clear how a court could correct the discrimination inherent in the procedure itself.

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"The Judicial Council believes that every petit jury should be of uniformly high calibre and capable of giving a fair trial in all cases. To attain this goal, the ordinary jury, as now provided, may be in need of improvement. It is, however, unjust and should be unnecessary to select supposedly special juries in specific cases." *Id.*, 46–47.

Once special procedures are allowed for select cases, as the prosecutor alone may determine, we adopt a formula as dangerous as some of those used when the Star Chamber flourished in England.

B. *Social Legislation.*

Justice Miller in the *Slaughter-House Cases*, 16 Wall. 36, 81, spoke of the Equal Protection Clause of the Fourteenth Amendment as follows: "We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." That prediction did not come to pass. It was not many years before all sorts of interests were seeking and obtaining protection under that Clause.

A half century ago the Supreme Court was, indeed, quite strict in reviewing legislative classifications under the Equal Protection Clause. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, illustrates the narrow view that obtained at that time. Illinois made combinations in restraint of trade illegal, excepting, however, "agricultural products or livestock while in the hands of the producer or raiser." Since those covered by the Act and those exempt were "all alike engaged in domestic trade, which is, of right, open to all," the Court held that one could not be discriminated against to its disadvantage while the other went free. *Id.*, 560, 563.

Laundries can be subjected to special regulations respecting their hours of operation from which other businesses are exempt. *Barbier* v. *Connolly*, 113 U. S. 27, 31. Retailers can be subjected to a cigarette tax and wholesalers exempted from it without violating the Equal

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Protection Clause. *Cook* v. *Marshall Co.*, 196 U. S. 261, 274–275. Carriers and other utilities may be subjected to taxes from which other businesses are exempt. *Rapid Transit Corp.* v. *New York*, 303 U. S. 573. Why, then, could not combinations of industrialists be treated differently than combinations of agriculturists?

The *Connolly* case was overruled in 1940 by *Tigner* v. *Texas*, 310 U. S. 141. In that case the Supreme Court allowed Texas to draw a line in its antitrust laws between combinations of businesses and combinations of agriculturists. Units of enterprise are not necessarily the same because both are in domestic trade. Combinations of farmers may well be thought by legislators, as the Court said in the *Tigner* case, to present less of a threat to society than industrial combinations. *Id.*, 145. One unit is not the same in law as another, if they are in fact different. Nor are they the same in law, if there is a rational opinion, as distinguished from a capricious one, that they are in fact different. And there is a basis for a distinction if the danger feared is "characteristic of the class named." *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144.

In the same current of thought is *Mohammad & Co.* v. *Andhra*, 41 A. I. R. 314, where the Supreme Court of India upheld a sales tax that applied to hides but not to other commodities.

The equality of women is a theme common to America and India. Yet to state a difference in sex is to state a classification that legislatures can make for numerous purposes. Hours of labor of women can be set with a view to the special requirements of the sex. *Muller* v. *Oregon*, 208 U. S. 412; *Miller* v. *Wilson*, 236 U. S. 373. So may minimum wages. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. The United States Supreme Court has even held that the State may ban bartending by women, since the legislature may have the allowable judgment that bartending by women gives rise "to moral and social problems" needing preventive measures. *Goesaert* v. *Cleary*, 335 U. S. 464, 466. India covers much

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the same ground by Article 15 (3) of the Constitution, "Nothing in this Article shall prevent the State from making any special provision for women. . . ." That provision was used by the Supreme Court to sustain a law providing that only the man, not the woman, was punishable for adultery. *Aziz* v. *Bombay*, 41 A. I. R. 321. Discriminations *against* women, however, do not fare so well. *Devi* v. *Uttar Pradesh*, 41 A. I. R. 608, from the High Court of Allahabad, held a provision of an Act unconstitutional which made it easier to have a woman declared incompetent to manage her own estate, than for a man to be declared similarly incompetent. The mandate of Article 15 (1) is clear, "The State shall not discriminate against any citizen on grounds only of . . . sex . . . ."

Territorial lines may be drawn within a State, marking the establishment in one area of different governmental machinery, such as courts, than that which exists in another. *Missouri* v. *Lewis*, 101 U. S. 22. America and India apparently think alike on that problem. Geography, however, is no infallible standard for classification. Taxing people of one locality and exempting people of another locality, even though they are in the same trade or profession, would raise a distinct problem. Such a law would have some of the infirmities of the one which the Supreme Court noted in *Rajasthan* v. *Singhji*, 41 A. I. R. 297. There certain land owners (Jagirdars) in one area of a State were allowed to collect rents, but Jagirdars in the other areas of the State were not allowed to do so, even though there was no discernible difference between them. The court held the law unconstitutional as having "no rational basis" for the differentiation. *Id.*, 299.

I indicated in an earlier Lecture that corporations are persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment. There are indications that in India the corporation has like protection under Article 14 of the Indian Constitution. See

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Seshadri v. *Officer*, 41 A. I. R. 806, from the High Court of Madras.*

Under American law, one State may exclude foreign corporations (*i. e.*, those incorporated in another State) from conducting within the State an *intrastate* (but not an *interstate*) business. Once the foreign corporation is admitted to do business within a State, it is entitled to equal protection with the States' domestic corporations (see *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494); and it may not be subjected to taxes of a different nature or amount than those exacted from identical domestic corporations. *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562.

The classifications sustained by the United States Supreme Court in the field of taxation (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Welch* v. *Henry*, 305 U. S. 134) came to mind as I read *Singh* v. *Regional Transport Authority*, 41 A. I. R. 190, where the Supreme Court sustained a Bengal law fixing one rate or tariff for taxis with a small horsepower and another rate for taxis with a greater horsepower. The Court announced that the classification would not be invalid under Article 14 of the Constitution "if any state of facts may reasonably be conceived to justify it." *Id.*, 192. The Court went on to say,

"It is clear that it is in the interests and for the benefit of a section of the public that small taxis have been introduced and cheaper rates have been fixed having regard to the size, horsepower and expenses of running such cars." *Id.*, 192.

It was held in *Buck* v. *Bell*, 274 U. S. 200, that sterilization of imbeciles was permissible to prevent the perpetuation of those socially unfit and harmful people. But when a sterilization law was applied to those who robbed

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*Articles 15 and 16, however, extend their protection only to "citizens."

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banks from the outside, but not to those who ~~pilfered banks~~ raided them from within, the Supreme Court invalidated the law as denying equal protection. *Skinner* v. *Oklahoma*, 316 U. S. 535. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.*, 541.

The invidious discrimination may not appear on the face of the law. If it appears in practice, it is also fatal. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." So spoke the United States Supreme Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374, in the year 1886.

The case involved an ordinance of San Francisco, requiring a license to conduct a laundry business. Petitioner was a Chinese, long in the laundry business there. He showed that this ordinance, which on its face was fair and applicable to all people, was in practice applied so as to exclude Chinese from the laundry business. The city could not, consistently with the Equal Protection Clause of the Fourteenth Amendment, have made that classification in the ordinance itself. Neither could the agency administering the ordinance apply it "with a mind so unequal and oppressive" as to amount to a practical denial of equal protection of the laws. *Id.*, 373.

So far as opportunities for work are concerned, no classification can be based on race; nor may the administration of a statute, fair on its face, be influenced by enmity or prejudice or other motives, so as to deny members of one race an opportunity for work allowed the other races.

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East and West often do not understand the other's actions. There must be decisions of the American courts that are bewildering to the Indian Bench and Bar. I confess that *Bombay* v. *Appa*, 39 A. I. R. 84, from the High Court of Bombay, had that effect on me. A state law outlawed bigamous marriages by Hindus but not those contracted by Muslims. The law made bigamous marriages by Hindus void. It also attached criminal penalties to them, making any Hindu who contracted such a marriage punishable by fine and imprisonment. It comported with traditional concepts for the court to hold that bigamous marriages could not gain immunity from prosecution by being called a part of a religion. But the law was also upheld against the claim that it denied Hindus equal protection of the laws. As indicated, the law excluded Muslims. Nevertheless, the court held that it was not arbitrary or capricious but based upon reasonable grounds. The court stated that it was proper for the legislature to undertake this "social reform by stages"; and the stages, it was said, "may be territorial or they may be community-wise." * *Id.*, 87.

Chowdhury v. *Union of India*, 14 Sup. Ct. Jour. 29, presented another extreme test of equal protection of the

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*Chief Justice Chagla said:

"The question that we have to consider is whether there is any reasonable basis for creating the Muslims as a separate class to which the laws prohibiting polygamy should not apply. Now, it is an historic fact that both the Muslims and the Hindus in this country have their own personal laws which are based upon their respective religious texts and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds. Article 44 itself recognises separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy the privilege of a common uniform Civil Code applicable to all its citizens irrespective of race or religion. Therefore, what the Legislature has attempted to do by the Hindu Bigamous Marriages Act is to introduce social reform in respect of a particular community having its own personal law. The institution of marriage

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laws under the Indian Constitution. An investigation showed abusive practices by the management of a textile company. Thereupon a law was passed to correct the abuses. The law was not made applicable to all companies. The law contained no provision making it possible for the government to bring under like regulation any other company committing the same offense or engaging in the same abusive practices. This law applied only to this particular company. It in substance provided for dismissal of the existing managers and directors, authorized the government to name successor directors, and deprived the shareholders of the right to elect directors or to pass any resolution or to wind up the affairs of the company without the approval of the government. A divided Supreme Court sustained the law, relying on the presumption of constitutionality which every piece of legislation enjoys and the wide discretion which the legislature has to classify persons and subjects for purposes of regulation.

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is differently looked upon by the Hindus and the Muslims. Whereas to the former it is a sacrament, to the latter it is a matter of contract. That is also the reason why the question of the dissolution of marriage is differently tackled by the two religions. While the Muslim law admits of easy divorce, Hindu marriage is considered indissoluble and it is only recently that the State passed legislation permitting divorce among Hindus. The State was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work social reform; another may not yet be prepared for it; and Art. 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise. From these considerations it follows that if there is a discrimination against the Hindus in the applicability of the Hindus Bigamous Marriages Act, that discrimination is not based only upon ground of religion. Equally so if the law with regard to bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds." *Id.*, 87.

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In America, the law would doubtless have been condemned.* The abuses of one company might be the occasion for the passage of the law. But the law must reach all in like circumstances or conditions. The fact that it is applied to only one is of no consequence, provided it is a law of general application. A law aimed in terms at only one man, one company, one taxpayer, one farmer, or one trade union contains the very essence of that discrimination condemned by our Fourteenth Amendment.

American courts have also made extreme decisions. And when they do, it is usually because they forget the teaching of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, that "the equal protection of the laws is a pledge of the protection of equal laws."

But when, as I pointed out in Lecture I, the Supreme Court of India struck down provisions for separate electorates for members of different religious communities (*Das* v. *State*, 16 Sup. Ct. Jour. 546) and refused to permit state universities to admit students on a quota system based on religion, race, and caste (*Madras* v. *Srinivasan*, 14 Sup. Ct. Jour. 313), it spoke in the same great tradition as did our Court in *Yick Wo* v. *Hopkins*.

Pratapsingh v. *Rajasthan*, 42 A. I. R. 5, is in that tradition also. It involved an order which provided for an increase in police in a certain area at the cost of the inhabitants, but exempted Harijans and Muslims because, it was claimed, they were peaceful and law-abiding. This was held by the High Court of Rajasthan to offend Article 15, as a discriminatory measure. The Court pointed out that peacefulness is an individual trait and that no law can justify such a distinction for an entire religious group. The Court said:

"Disturbing elements may be found among members of any community or religion just as much as there may be

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*The law was condemned in later litigation under another provision of the Indian Constitution. See *Shrinivas* v. *Shalapin Spinning & Weaving Co.*, 17 Sup. Ct. Jour. 175, discussed in Lecture VIII.

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saner elements among members of that community or religion. The exemption granted to Harijan and Muslim inhabitants because they were Muslims or Harijans and therefore peaceful cannot stand as it offends against Art. 15 of the Constitution." *Id.*, 6.

C. *Aliens.*

The Supreme Court of the United States held in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, that the word "person," as used in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, includes an alien.* "These provisions," said Justice Matthews, "are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ." *Id.*

That has been the consistent view of the Court over the years. The Court recognizes that aliens are subject to many disabilities which may not be imposed on citizens. An alien enemy is subject to expulsion or internment on the outbreak of war; and in days of war or peace the alien may be expelled for any reason the law-makers choose.** *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Galvan* v. *Press*, 347 U. S. 522. The alien's domicile is, therefore, "held by a precarious tenure," as the Court in the *Harisiades* case said. *Id.*, 587. Nevertheless, while he is resident in the States, he is entitled to the benefit of the Equal Protection Clause.

As I have noted, the *Yick Wo* case held that a Chinese could not be excluded from the laundry business, merely because he was Chinese.

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*A dictum in *In re C. G. Menon*, 40 A. I. R. 729, 732, decided by the High Court of Madras, says that Article 14 of the Indian Constitution, likewise, "is not limited to the citizens of India." Articles 15 and 16 are, however, so limited.

**It has been assumed that the *ex post facto* clause of Article I, Section 9 of the Constitution is not applicable to deportation proceedings. But see the review of authorities in Boudin, *The Settler Within Our Gates*, 26 N. Y. U. Law Rev. 634.

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Truax v. *Raich*, 239 U. S. 33, further protected the alien's right to work by holding unconstitutional an Arizona law, requiring employers, who hired more than five workers at any time, to hire not less than 80 per cent who were citizens. The law was invalid, because it discriminated "against aliens as such in competition with citizens." *Id.*, 43.

We do not deal here with absolutes. Even alienage may warrant discriminatory legislation. Pennsylvania was sustained in *Patsone* v. *Pennsylvania*, 232 U. S. 138, when she forbade aliens who were resident in the State to kill any wild bird or animal, though she allowed citizens that privilege. The Court, speaking through Justice Holmes, said that the question was whether the State was warranted in assuming that the alien was a "peculiar source" of difficulty in game laws. The problem, he said, was "one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts." *Id.*, 144. By like reasoning, the Court in *Clarke* v. *Deckebach*, 274 U. S. 392, upheld an Ohio law prohibiting aliens from operating public billiard and pool rooms.

"We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies." *Id.*, 397.

The Court has applied the philosophy of the last two cases to the extreme illustrated by *Terrace* v. *Thompson*, 263 U. S. 197. The State of Washington enacted a law barring aliens from owning agricultural land in the State. An alien was defined as excluding one who, in good faith, had declared his intention to become a citizen of the United States. Restriction of land ownership to citizens, and to those aliens who were pledged to become citizens, was held not to violate the Equal Protection Clause. The disability to own land was ranked equally with the disability to vote and hold office. An alien who has

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not undertaken to become a citizen, it was held, may be put in a separate category from the other inhabitants of the State. For the Court felt that that class of aliens does not have the interest in the welfare of the State that the others have, and that land is so vital to the State, that its ownership must be carefully guarded. "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself." *Id.*, 221.

The *Terrace* case has not been overruled. But a shadow has been cast on it by some opinions in *Oyama* v. *California*, 332 U. S. 633, which commanded the support of four Justices. Those opinions maintained that state land laws, discriminating against aliens, violated the Equal Protection Clause. And see *Takahashi* v. *Fish Commission*, 334 U. S. 410, 422.

Whatever may be the vitality of the *Terrace* case, the Court in the *Oyama* case was alert not to expand it. In that case, the State sought to extend the disability of the alien-father to the minor son (who by command of the Fourteenth Amendment was a citizen, because he was born in the States). This minor son was treated differently than minor sons of other aliens, because his father was Japanese, rather than English, German, Mexican, etc. A citizen, said the Court, could not be disadvantaged before the law because his father was a member of one race rather than another. Allowance of that classification would be racism rampant.

The strong bias of the present Court against race as a classification is shown by *Takahashi* v. *Fish Commission*, 334 U. S. 410. California made aliens, who were ineligible for citizenship, disqualified to work as commercial fishermen in the waters off the coast of California. Petitioner was a Japanese who was denied a license on the sole grounds that he was not eligible for American citizenship. This law was held invalid, as violating the Equal

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Protection Clause. A man may not be excluded from commercial fisheries merely because of his race or color.

America today is a multi-racial community. By and large it extends to all lawful inhabitants the same privileges. Aliens, of course, do not vote; they are disqualified for many offices; and some are not eligible for citizenship. But at the social and economic level they have most of the privileges that citizens enjoy. The exceptions that have been authorized and sustained are few in number and narrow in scope. Alienage has seldom been allowed as the basis of classification; and alienage, as a cloak for discrimination based on race or color, has been almost uniformly condemned.

Race and color are of no legal consequence in the main affairs of life in America. And when some prejudiced group tries to make them so, it does not win victories in the courts.

D. *Voting Rights.*

~~Universal suffrage is guaranteed by both the Indian and American Constitutions.~~ In India adult suffrage is accorded citizens not less that 21 years old who have the qualifications prescribed by the ~~state~~ legislature. Article 326. And it is provided in Article 325 that no person shall be ineligible for inclusion on any electoral roll "on grounds only of religion, race, caste, sex, or any of them." *

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*India's first general elections, which lasted over a period of several months during the latter part of 1951 and the early part of 1952, served as an impressive example of the democratic processes in action. Between 50 and 60 per cent of the total electorate of some 180 million men and women went to the polls.

The task of preparing for the election was a considerable one. Over two and a half million ballot boxes were required, along with hundreds of millions of paper ballots, and other election paraphernalia, for use in a quarter of a million polling booths. In addition, the staffing of the polling centers was a major undertaking. The problem of the large numbers of illiterate voters was solved by the use of symbols for

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In the United States, women won their right to vote by the Nineteenth Amendment, ratified in 1920, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." The Negroes, emancipated by Lincoln during our bloody Civil War, gained their right to vote by the Fifteenth Amendment, ratified in 1870: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The very essence of political equality is the right to vote. Once it is conceded that every man is equal in the voting booth, there is the beginning of real democracy. Then minorities can use political action as an instrument of protection. Then the man running for office must seek votes among all branches and segments of the community. And it is common experience that when the candidate must seek support from all levels of his community, his political creed will be tolerance, not hatred; equal protection for every minority, not discrimination.

Equality in voting has given every minority in America an opportunity to protect its interests through political action. Political action is, doubtless, the main reason for the tremendous advancement of the Negro during the last ninety years. His political action was made possible by a liberal and vigorous enforcement by the Supreme Court of the Negro's political rights under the Fifteenth Amendment.

The qualifications for voters in both state and federal elections in the United States is determined by state law.*

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each party. India's election proved, indeed, that even illiterate people can play a wise role in a nation's life and share in the processes of democratic government.

*Congress has provided penal provisions for corruption, bribery, and intimidation in connection with elections of federal officials. See 18 U. S. C. § 591 *et seq.* For leading cases in this field, see *Ex parte Siebold*, 100 U. S. 371; *United States* v. *Gale*, 109 U. S. 65; *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosley*, 238 U. S. 383;

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Literacy tests are permissible. *Williams* v. *Mississippi*, 170 U. S. 213. Payment of a poll tax may be exacted. *Breedlove* v. *Suttles*, 302 U. S. 277. And other qualifications may be prescribed by the States, so long as those regulatory measures are not employed or administered with the evil eye of discrimination which was condemned by *Yick Wo* v. *Hopkins*, 118 U. S. 356, discussed above.

The "grandfather clause" met that fate in *Guinn* v. *United States*, 238 U. S. 347. Oklahoma provided as a qualification for voting the ability to read and write any section of Oklahoma's constitution, excepting, however, descendants of persons who on January 1, 1866, were entitled to vote. That date was prior to the adoption of the Fifteenth Amendment. Therefore, the effect of Oklahoma's law was that a Negro could not vote, if he were illiterate, while a white man could vote, even though illiterate. The Court, therefore, struck down the law. This decision was made on June 21, 1915.

Proponents of the Oklahoma measure tried another evasive device. Oklahoma statutes made registration a prerequisite to voting. They provided that all citizens qualified to vote in 1916, who failed to register between April 30 and May 11, 1916, should be perpetually disfranchised, excepting those who voted in 1914. The effect was that white people, who were on the voting lists by reason of the "grandfather clause" struck down by the *Guinn* case, were entitled to vote, while Negroes, kept from registering and voting by the "grandfather clause," would be perpetually disfranchised, unless they applied for registration during the 12-day period in 1916 which the Oklahoma law prescribed. The Court struck these

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United States v. *Brewer*, 139 U. S. 278; *Connors* v. *United States*, 158 U. S. 408; *Wiley* v. *Sinkler*, 179 U. S. 58. And see Sait's American Parties and Elections (1948). Congress has enacted the Federal Corrupt Practices Act, 2 U. S. C. § 241 *et seq.*, which regulates the campaign expenditures and contributions for elections to Congress. And see 18 U. S. C. § 602 *et seq.*; *United States* v. *Wurzbach*, 280 U. S. 396; *United Public Workers* v. *Mitchell*, 330 U. S. 75.

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laws down also because, "They operated unfairly against the very class on whose behalf the protection of the Constitution" had been invoked in the *Guinn* case. *Lane* v. *Wilson*, 307 U. S. 268, 277. They were, indeed, a patent dodge and subterfuge—a clever attempt to avoid the Fifteenth Amendment.

In 1946 Alabama adopted a new constitutional provision, granting voting rights only to those persons who could "understand and explain" any article of the Federal Constitution to the satisfaction of the Board of Registrars. Negroes applied for registration and were denied it, because members of the board were not satisfied with the explanations given. This law was invalidated as a discriminatory device aimed at the Negro race. ". . . the board has a right to reject one applicant and accept another, depending solely upon whether it likes or dislikes the understanding and explanation offered." *Davis* v. *Schnell*, 81 F. Supp. 872, 878, aff'd. *sub. nom. Schnell* v. *Davis*, 336 U. S. 933.

A like fate met the "white primary." *Nixon* v. *Herndon*, 273 U. S. 536. The primary election is the method commonly used by a political party to select the candidate to run for office on that party's ticket. State laws regulate the primary election, as well as the general election. Once the State regulates the election, its rules must conform with the Fourteenth Amendment. For, as we have seen, that Amendment is aimed at state action* which

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*As noted in Lecture VIII, the Fourteenth Amendment is only directed toward state action. This has been clearly established since the *Civil Rights Cases*, 109 U. S. 3, decided in 1883, where

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note

In Gerende v. Election Board, 341 U.S. 56, the Court upheld a
yland law construed as requiring candidates for public office to make
oath that they were not engaged in an attempt to overthrow the
rnment by force or violence and were not knowingly members of an
nization engaged in such an attempt.

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laws down also because, "They operated unfairly against the very class on whose behalf the protection of the Constitution" had been invoked in the *Guinn* case. *Lane* v. *Wilson*, 307 U. S. 268, 277. They were, indeed, a patent dodge and subterfuge—a clever attempt to avoid the Fifteenth Amendment.

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***As noted in Lecture VIII, the Fourteenth Amendment is only directed toward state action. This has been clearly established since the *Civil Rights Cases*, 109 U. S. 3, decided in 1883, where the Court held that the Fourteenth Amendment, and the enforcing legislation which Congress enacted thereunder, did not bar discrimination by individuals which did not have the sanction of the State behind it. An individual may, so far as the Fourteenth Amendment is concerned, practice discrimination in his business and social relations. Such conduct does not fall within the ban of the Fourteenth Amendment. Theatres, hotels, restaurants, and similar establish-

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denies equal protection of the laws. Texas passed a law making Negroes ineligible to vote in a Democratic primary election. The law was struck down as a denial of equal protection. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting . . ." voting rights. *Id.*, 541.

Texas changed its law and gave every political party the power to prescribe qualifications of its members and qualifications for those who voted its ticket. The Democratic Party in Texas adopted a resolution that any white Democrat could participate in the primary election. This, too, was condemned. *Nixon* v. *Condon*, 286 U. S. 73. Since the Democratic Party exercised power granted by the State, the barring of Negroes was state action and condemned by the Fourteenth Amendment.

Then came a brief interlude—a victory for the "white primary." The Democratic Party in Texas, on its own and as a matter of internal regulation, disqualified Negroes from voting in primary elections. This was held in *Grovey* v. *Townsend*, 295 U. S. 45, not to be state action within the purview of the Fourteenth Amendment. That decision was in 1935. In 1944 it was overruled by *Smith* v. *Allwright*, 321 U. S. 649. It was there held that it made no difference whether the party, as a matter of its own internal regulation, set the qualifications for its members or whether the State did. The primary election is an integral part of the electoral process, making the primary electoral machinery as much state action as the general

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ments cannot, on the basis of the Fourteenth Amendment, be prohibited from practicing discrimination, if they choose to do so, unless of course a law prohibits it. Many States have laws outlawing discrimination. Laws of that character are within the police power. See *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100.

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election itself.* The action of the party is therefore "the action of the State." *Id.*, 665. The discrimination is state action condemned by the Fifteenth Amendment:

"When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment." *Id.*, 664.

The results of *Nixon* v. *Herndon* and *Smith* v. *Allwright* have been profound. The doors are now open to Negroes in the primary as well as the general election. There

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*The right to choose a federal official is a right guaranteed by the Constitution. Thus Article I, Section 2 provides, "The House of Representatives shall be composed of Members chosen every second year by the People of the several States and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." This right is without restriction. Unlike the rights granted by the Fourteenth and Fifteenth Amendment, it is "secured against the action of individuals as well as of states." *United States* v. *Classic*, 313 U. S. 299, 315. Moreover, that right extends to primary elections as well as general elections. In some States, the primary election is, indeed, the key election, since the winner of the primary election in one political party always (or almost always) wins the general election.

"Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2." *Id.*, 318.

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are still deterrents to voting; but they are mostly in the field of the imponderables and do not relate to legal rights. The Negroes' right to vote is being capitalized on more and more. Thus in the 1952 election, the Negro registration in Florida was 120,900; Georgia 146,200; Louisiana 120,000; North Carolina 100,000; South Carolina 110,000; Tennessee 150,000; and Texas 205,000. These registrations show a marked upturn in the growing political consciousness in the Negro group in the South.

In the North, Negro voting has been pronounced. Louis Harris reviewed the matter in *Is There a Republican Majority?*, saying:

"In 1948, estimated Negro voting was on a par with the national average. In 1952, 59 per cent of the eligible voters in the country as a whole came to the polls on election day. Among Negroes in the North, 60 per cent of those over 21 voted.

"The fact that Negroes in the North make it their business to vote is a key political fact. For it highlights the intense political feeling among Negroes in America today.

"In turning out the way it does, the northern Negro population has overcome two difficult obstacles. No more than 42 per cent of all low-income people voted in the 1952 election. Negroes fall more heavily into the lowest income groups than any other major racial, religious, or nationality group. But Negro voting in the low-income brackets runs at a rate double that of whites.

"What is more, we know that when people are new residents in an area, they are less likely to vote than are the old residents. In the six largest states of the North, over 40 per cent of the Negroes have lived in the state less than ten years.

"Turnout among Negroes in the North has suffered neither because of their low income status nor on account of their recent residency. In 1952, Negroes in the North took more advantage of their democratic rights than did housewives, union labor, or northern farmers. They did

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it in the face of barriers which would have deterred a less determined people.

"But the Negro voters of the North are among the most dedicated, single-minded, and driving forces in America today."* *Id.*, 152–153.*

E. *Segregation.*

In 1896 the Supreme Court handed down the decision in *Plessy* v. *Ferguson*, 163 U. S. 537, which sanctioned as constitutional the segregation of the white and colored races. The question there presented concerned segrega-

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*The American Negro has made tremendous strides during the past 90 years. Many of our outstanding figures in the sports and entertainment fields have been members of the Negro race. Others have come to occupy a prominent place in law, the arts, and sciences, education, and nursing. As of 1948, there were about 3,750 Negro physicians in America.

American Negroes have made notable achievements in the field of Government. In the federal government, over 20 Negroes have achieved membership in the United States Congress, including two present members, Representatives Adam C. Powell of New York and William L. Dawson of Illinois. Several Negroes have held federal judgeships in recent years, including one of the present members of the Court of Appeals for the Third Circuit, Judge William H. Hastie.

Similar achievements have been attained in many of the States, with Negroes serving in the legislatures of about one-third of our States, and others holding state judgeships.

In addition, many Negroes now sit on our local city councils and hold various administrative posts in local, state, and federal governments. As of March 1955, for example, the following important positions were held by Negroes in the City of Chicago, our second largest city: State Senator; six State Representatives; County Commissioner; Civil Service Commissioner; two Municipal Court Judgeships; four Aldermen; one Circuit Court Judge; Municipal Court Referee; five Assistant States Attorneys; two Corporation Counsel; three Assistant Corporation Counsel; Public Defender; Sanitary District Trustee; Member of Board of Education; and Member of Library Board.

Several Negroes have served with distinction in our diplomatic and consular service, in our Point IV and other technical aid programs, and in the United Nations. Of these, Dr. Ralph Bunche is perhaps the most outstanding.

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tion of the races on railroad cars. But the rule announced in the case set the pattern for the treatment of the Negro race. The rule was applied (not in all States but in quite a number of them) to all public facilities, as well as to railroads. It was extended also to community activities, including public schools.*

The rule of *Plessy* v. *Ferguson* was the "separate but equal" doctrine. The races could be segregated, provided the facilities afforded one were equal to the facilities afforded the other. That is to say, the Negro race could be put in a separate railroad car, a separate restaurant, a separate park, a separate school, provided the car, restaurant, park, or school separately provided was equal to the one reserved for the whites.

There was an ancillary community development in the form of restrictive covenants. An area of a community would be set aside exclusively for one race or another. The practice developed of inserting in deeds of realty restrictive covenants, by which the grantee promised, for example, not to sell to anyone but a member of the Caucasian race. These restrictive covenants helped build segregated communities.

It was held that a city ordinance that forbade colored people from occupying houses in a zone reserved for the whites was unconstitutional. That was the ruling in *Buchanan* v. *Warley*, 245 U. S. 60. A city ordinance has all the compulsion of law; it is therefore state action within the meaning of the Fourteenth Amendment. The state action condemned in the *Buchanan* case restricted the free use of property, making it ineligible for sale to a member of the colored race. It therefore violated the Due Process Clause of the Fourteenth Amendment.

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*The following States, as well as the District of Columbia, required segregation in the public schools: Alabama, Delaware, Florida, Arkansas, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Oklahoma, Tennessee, Texas, Virginia, West Virginia, Maryland. Four States—Kansas, Wyoming, Arizona, and New Mexico—permitted segregation.

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ise scope of Article 15(2) of the Indian Constitution
ave been judicially determined, it seems that it a
as well as to State action insofar as access to shop
hotels and places of public entertainment are
15(2) provides:
hall, on grounds only of religion, race, caste, sex,
ny of the, be subject to any disability, liability,
dition with regard to -
to shops, public restaurants, hotels and places of
nt; or
of wells, tanks, bathing ghats, roads and places of
tained wholly or partly out of State funds or
se of the general public."
is expressed by Durga Das Basu in A Commentary on the
ndia (1950) p. 61.

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How about private arrangements? Is a covenant in a deed that restricts the sale of the property to members of a particular race valid? If the parties conform to the covenant without the compulsion of a state law, there is no state action that brings the Fourteenth Amendment into play. But suppose they do not comply with the covenant. Suppose one threatens to break it and the other goes into court to enjoin the breach. May a court issue the injunction without violating the Fourteenth Amendment? The Court held in *Shelley* v. *Kraemer*, 334 U. S. 1, that judicial enforcement of these restrictive covenants through issuance of an injunction would be state action within the meaning of that Amendment. The action of state courts and state judicial officers is as much state action as actions of the legislative branch or of the executive. The Fourteenth Amendment condemns all state action denying equal protection of the laws, whatever department of government is implicated. The *Shelley* case was soon followed by *Barrows* v. *Jackson*, 346 U. S. 249. In the latter case, no injunction enforcing the restrictive covenant was sought; rather it was an action at law for damages for breach of the covenant. That action was also held to be barred by the Fourteenth Amendment. The Court refused to distinguish between an action to enjoin and an action for damages, saying:

"To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants." *Id.*, 254.

The question of segregation in public schools was slow in coming to a head. But it finally was ripe for decision in 1954. Between 1896, the date of *Plessy* v. *Ferguson*, and 1954 there had been much litigation over the "separate but equal" doctrine. The Court had made clear over and again that segregation was permissible only if

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the facilities accorded Negroes were in fact equal to those accorded whites.*

A State that had no law school for Negroes was under a duty to admit a qualified Negro student into the law school run for whites. Such was the holding in *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337. The Court, speaking through Chief Justice Hughes, said:

"The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination." *Id.*, 349–350.

Then came a like case from Oklahoma, also involving a Negro candidate for legal education. A like result followed. *Sipuel* v. *Board of Regents*, 332 U. S. 631.

One State provided a separate law school for Negroes. But on a showing that it was not substantially equal to the law school reserved for the whites, the Court held that a Negro candidate should be admitted into the latter school. *Sweatt* v. *Painter*, 339 U. S. 629.

In *McLaurin* v. *State Regents*, 339 U. S. 637, a Negro graduate student, though admitted to a white school, was

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*The Interstate Commerce Act provides that it shall be unlawful for any common carrier to subject any person to any undue prejudice. 49 U. S. C. § 3 (1). On the basis of that provision, the Court has struck down attempts to segregate Negro railroad passengers, where the facilities were separate but not equal, in regard to dining facilities (*Henderson* v. *United States*, 339 U. S. 816) and sleeping accommodations, *Mitchell* v. *United States*, 313 U. S. 80.

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assigned to a row in class that was set aside for Negroes, to a special table in the library, and to a special table in the cafeteria. The Court held this segregation unconstitutional under the Fourteenth Amendment, saying:

"There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. . . . The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits." *Id.*, 641–642.

At last, the "separate but equal" doctrine itself was challenged. It was argued that, though the separate facilities were equal one to the other, segregation was *per se* unconstitutional. The question was squarely presented in *Brown* v. *Board of Education*, 347 U. S. 483, and a group of companion cases involving state segregation laws.*

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*On July 26, 1948, President Truman issued Executive Order 9981 which provides in relevant part:

"Whereas it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense:

"Now, therefore, by virtue of the authority vested in me as President of the United States, by the Constitution and the statutes of the United States, and as Commander in Chief of the armed services, it is hereby ordered as follows:

"1. It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale. . . ."

Integration in the Armed Services went on apace. By ~~June 30, 1954, integration was completed, as indicated by the fact that no all-Negro units were any longer in the Armed Services.~~ the end of 1954 there were no all-Negro units in the Armed Services.

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A unanimous Court, speaking through Chief Justice Warren, held the "separate but equal" doctrine unconstitutional, saying:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.*, 493.

In a companion case from the District of Columbia, which is a federal domain, the Court made the same ruling. *Bolling* v. *Sharpe*, 347 U. S. 497. That ruling was made in spite of the fact that the Fifth Amendment, as I said earlier, has no Equal Protection Clause. But racial discrimination, said the Court, may be so invidious as to violate the Due Process Clause of ~~the Fifth~~ Amendment.

"Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Id.*, 500.

F. *Federal vs. State Trials.*

America's dual court system has led to a major problem in the area of civil rights with which the unitary Indian court system has not been confronted, namely, the choice of an appropriate forum for the trial of state officials

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who infringe civil rights guaranteed by the federal Constitution.

The administration of criminal justice in America has been preeminently a state function. Murder, felonious assaults, and the like are in general crimes under state laws not under federal laws; and their prosecution is historically a state function. Many are repelled at the thought of having the prosecution of such offenses as assault or murder controlled by a distant central government in Washington, rather than by local state officials. They fear the dangers that are inherent in over-centralization of law enforcement in a country as vast as ours. The local sheriff, who mistreats a prisoner, may be depriving him of his federal rights guaranteed by the Constitution or by Acts of Congress. Yet he is also likely to be committing an offense under state law, which would normally be tried in a state court.

In spite of strong feelings on the part of many against resort to a federal forum in such cases, Congress has provided for a federal trial of infringers of civil rights. That legislation dates back to the Civil War era.

At present, the basic provision in this area is codified in 18 U. S. C. § 242:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

This provision originated in the Civil Rights Act of 1866, 14 Stat. 27, and was originally designed to secure protection to the newly-emancipated Negroes by punishing state officials who wilfully mistreated them in viola-

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tion of federal law. The purpose of the legislation was explained by Congressman Wilson, of Iowa:

"If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect, and to equality in the exemptions of the law, we must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family. . . .

". . . The end is the maintenance of freedom to the citizen. What means more appropriate could be selected than that which punishes a man by commonly inflicted punishments through the ordinary channels of the law and the courts for depriving the citizen of those rights which, while he enjoys them, are his sure defense against efforts to reduce him to slavery?" Cong. Globe, 39th Cong., 1st Sess. 1118.

This Act, originally passed in 1866 prior to the Fourteenth Amendment, was later reenacted after that Amendment, as a means of securing the basic rights which the Amendment was designed to protect. 16 Stat. 144. The prohibition against depriving any person of rights, privileges, or immunities secured or protected by the United States Constitution was introduced in 1874. R. S. § 5510. In 1909, a requirement of wilfullness was added. 35 Stat. 1092.

The leading case in this area is *Screws* v. *United States*, 325 U. S. 91, decided by a sharply divided Court. The case involved a local sheriff who, during the course of arresting a Negro for a state offense, ~~wrongfully~~ beat him to death. The sheriff was charged with violating the Civil Rights Act by wilfully depriving the victim of his life without due process, in flagrant violation of the Fourteenth Amendment. He was convicted, and the case eventually reached the United States Supreme Court. Screws contended that by punishing violations of Due Process, the Act contained no ascertainable standard of

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guilt, since the Due Process Clause, as I pointed out earlier, has not been given a precise definition by the Court.

In rejecting this contention, the Court held that Congress, by adding the word "willfully," required a specific intent to deprive a person of a federal right that had been made definite by decision or other rule of law. The Act as thus construed was held valid.

In rejecting a claim that the sheriff had not acted under color of state law, as required by the statute, the Court adhered to the views expressed in the earlier case of *United States* v. *Classic*, 313 U. S. 299, that misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken under color of state law. While the Court upheld the Act,, it cautioned that "when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement." *Id.*, 108. A dissenting opinion contended that the Act even as thus construed would lead to "an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility." *Id.*, 160–161.

In *Williams* v. *United States*, 341 U. S. 97, the other major case in this area, the Court upheld a conviction under the Act where a special police officer, acting in his official capacity, subjected a person suspected of crime to force and violence to obtain a confession from him. The Court stated:

". . . where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. . . . Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. It was an arrogant and brutal deprivation of rights which the Constitution spe-

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cifically guarantees. Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection." *Id.*, 101–102.

These cases reflect a clash of interests and policies. State officials are likely to be less zealous in prosecuting their fellow officials for violation of federal rights, than federal officials not influenced by ~~the same~~ community attitudes and prejudices. On the other hand, Washington, D. C., is a long way from many of our villages and cities; and the sense of justice dominating a zealous Attorney General may be at war with the local attitude.

~~The *Screws* case represents a compromise between the two extremes. It leaves room for federal prosecution, without opening the door to displacement of local law enforcement agencies by federal officials.~~

The *Screws* and *Williams* cases teach ~~a more~~ important lesson. There may sometimes be a difference in the result of a prosecution, depending on what court has jurisdiction of the offense. That does not mean there is inequality or unfairness in the law. It means that large and important issues which divide people and heavily implicate their emotions also affect the bench and bar. For judges, lawyers, and jurors are also human. Courts are not entirely immune from those radiations of the community. Juries drawn from a community reflect its attitudes and are loath to run counter to them. Prosecutors do not often take a course with which the community has no sympathy or to which it is opposed.

All of which teaches ~~the lesson~~ that the strength and vitality of civil rights are not measured merely by judgments of courts or verdicts of jurors. Their greatest measure is perhaps the tenacity with which the community defends them, the care with which local governments foster and protect them.

Washington, D. C. or Delhi, as the case may be, may issue decrees and orders that the rights of man shall be protected in all of the towns and villages. But discrimination against the untouchable in India or against a

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~~colored~~ or religious minority in America will not be ~~safe~~ ~~guarded~~ until the communities in which they live at long last decide to admit them on the basis of equality.

Conclusion.

America, as I have said, is a multi-racial community. It has had many internal conflicts and stresses that emphasized racial tensions and animosities. Sometimes those conflicts have flared up into ugly episodes. Usually, they have been amicably settled. They have always been settled peacefully when we have been true to the principle stated in the American Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

Wherever equality is the theme, men live together in peace. Wherever inequality is the practice, grievances and complaints fester. Equality among men of all creeds, nationalities, and colors is the great curative of social ills. No one segment of society can long be set apart in a ghetto of second or third-class citizenship. Once that happens, a divisive influence is at work, that will sooner or later tear the community apart.

As an eighteenth century American, Joel Barlow, said concerning the theme that all men are equal in their rights, "This point once settled, everything is settled .... Banish the mysticism of inequality and you banish almost all the evils attendant on human nature."

Gandhi spoke eloquently of the problem when he pleaded for abolition of the caste of the untouchables. His was not a halfway solution. "We must not throw a few miserable schools at them: we must not adopt the air of superiority towards them. We must treat them as our blood brothers as they are in fact. We must return to them the inheritance of which we have robbed them. And this must not be the act of a few English-knowing reform-

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ers merely, but it must be a conscious voluntary effort on the part of the masses." *

What Gandhi said is equally true of the problem of every minority the world around.

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*Gandhi's philosophy is today expressed in Article 17 of the Indian Constitution which provides:

"'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

The distinguished Indian Ambassador to the United States, Gaganvihari L. Mehta, recently reported to an American audience on this problem, saying:

"The so-called 'untouchables' now occupy positions of importance such as ministerships in the Federal as well as State Governments; they are equal and honoured members of our legislatures and national services. They are free to enter temples and clubs and schools and places of common resort, from which they were till recently barred. Legislative and administrative measures are being taken in regard to education and government service so as to help them make up for lost opportunities. And yet, in spite of all that we are doing to root out this evil, I do not claim that 'untouchability' has been banished from India; it still lurks in several places; it still has allies in irrational prejudice and threatened privilege and unreflecting conservatism. But the Government of my country is determined not to give it any quarter and our Parliament has under consideration legislation which specifically details offences against the citizens' right to freedom of worship and association, and makes any exercise of ostracism in these spheres punishable by heavy fines or imprisonment or both. All this shows that the first successful battle in the domain of social reform does not necessarily ensure a final triumph; the initial assault has to be followed by much hard and patient work and the victory of law which is the victory of reason has to be strengthened by education, public opinion and cooperative endeavour."

U. N. Dhebar of the Congress Party recently stated:

"We in the Congress must be clear in our minds that genuine equality is unthinkable unless equal opportunities are made available to every citizen of India.

"We should make a final determined effort to shake off caste distinctions completely, being perfectly clear in our minds that these ultimately breed complexes which are inconsistent with our loyalty to the principles of a united nation."

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Equal protection is the most important single principle that any nation can take as its ideal. Those who practice it have a strength and unity that other nations lack. Those who practice it give to each minority a sense of belonging. And a sense of belonging is, perhaps, as important a community attitude as any. The duties, as well as the rights of citizenship, are generated out of the sense of belonging. Where there is a sense of belonging, there are ties of loyalty and devotion that no strains of politics can ever sever or destroy.

Gandhi once called for an India without "race-hatred." "Let that be our nationalism," said Gandhi. That was also the call of Lincoln and Franklin D. Roosevelt in America. A nation without race hatred is singularly strong in spirit.

The ~~idea~~ ideal that Gandhi set for his nation and that Lincoln and Roosevelt set for America is the ideal that we now set for our new world community.

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TAGORE LECTURES

XII

The Judiciary

In nations like America and India that have written constitutions, the judiciary must do more than dispense justice in cases and controversies. It also must keep the charter of government current with the times and not allow it to become archaic or out of tune with the needs of the day. That task involves interesting aspects of the ancient problem of *stare decisis*.

A. *Stare Decisis.*

Near the turn of the century, Justice Holmes wrote about the force which tradition exerts in the law and the need to study history if one is to make a rational study of law. Only if the history of a rule of law is known may we have "an enlightened scepticism" of it and be enabled to make "a deliberate reconsideration" of its worth. *Collected Legal Papers* (1952) pp. 186–187. And then Holmes added:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Id.*, 187.

Stare decisis plays, of course, an important role in private law. The whole fabric of commercial transactions, the basis of personal engagements, the foundations of real estate transfers, and the like presuppose a stability

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in the basic features of law.* As stated in *Helvering* v. *Hallock*, 309 U. S. 106, 119:

"We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

Helvering v. *Hallock* dealt with a problem of the construction of the Internal Revenue Act and discarded *stare decisis* for what was deemed to be a truer interpretation of the legislative plan. And see *Cosmopolitan Co.* v. *McAllister*, 337 U. S. 783. The fluidity of decisions is much greater, of course, when constitutional issues are considered. A constitution states principles rather than rules; and the principles, written in general terms, are designed not for one era only but for the vicissitudes of time. The Constitution is a compendium, not a code; a declaration of articles of faith, not a compilation of laws.

Stare decisis has, therefore, little place in American constitutional law. The illustrations are numerous. In *Smith* v. *Allwright*, 321 U. S. 649, which overruled *Grovey* v. *Townsend*, 295 U. S. 45—cases involving the right of Negroes to vote that are discussed in Lecture XI—the Court, speaking through Justice Reed stated:

"In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent.

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*Certainty is often more apparent than real. Judge Jerome Frank wrote of the uncertainties and pitfalls in the law in *Courts on Trial* (1949). He recounts the observations of Judge Learned Hand who long sat on the federal bench. Judge Hand remarked close to his retirement: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death." *Id.*, 40.

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In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day." *Id.*, 665.

From age to age, the problem of constitutional adjudication is the same. It is to keep the power of government unrestrained by the social or economic theories that one set of judges may import into the Constitution. It is to keep one age unfettered by the fears or limited vision of another.* In that connection, there is a fundamental tenet of faith that has evolved from our long experience as a nation. It is this: If the social and economic problems of state and nation can be kept under political management of the people, there is likely to be long-run stability. It is when a judiciary with life tenure seeks to write its own social and economic creed into the Charter that instability is created. For then the nation lacks the

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*The late Professor James Bradley Thayer of Harvard, in *Legal Essays* (1908), 158, stated:

"And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution,—of what people have been imagining and putting forward as the Constitution. That it was unconstitutional to buy Louisiana and Florida; that it was unconstitutional to add new states to the Union from territory not belonging originally to it; that it was unconstitutional to govern the territories at all; that it was unconstitutional to charter a bank, to issue paper money, to make it a legal tender, to enact a protective tariff,—that these and a hundred other things were a violation of the Constitution has been solemnly and passionately asserted by statesmen and lawyers. Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistance of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its spirit, and sought thus, when the question was one of mere power, to restrict its great liberty."

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adaptability to master the sudden storms of an era. For the process of constitutional amendment is usually a long and slow one.

America.

~~The American and Indian approaches to this problem are quite similar.~~ Justice P. N. Sapru said in his Agra University Lectures in 1953, "We ought to approach the Consitution not as a law of Medes and Persians which cannot be changed but as something which it is in our power to bend for worthy objectives." That philosophy is reflected in what Thomas Jefferson wrote about the Constitution,

"Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead." *

A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false, and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

Throughout American history the Supreme Court has never hesitated to overrule constitutional decisions that did not seem to fit the requirements of the new age.

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*Letter to Samuel Kercheval, July 12, 1816.

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This reexamination of precedent in constitutional law is a personal matter for each judge who comes along. When only one new judge is appointed during a short period, the unsettling effect in constitutional law may not be great. But when a majority of a Court is suddenly reconstituted, there is likely to be substantial unsettlement.

That was true of the so-called Roosevelt court that was appointed beginning in 1937. In the next 18 years, some 20 constitutional decisions were overruled.* And in the great majority of those instances the cases overruled had been decided within the previous 20 years.

As these Lectures have shown, the new Court did not make great innovations in constitutional law. Rather, it returned to first principles, as early pronounced by

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*The following are the cases decided by the Supreme Court between 1937 and 1955 which *expressly* overruled prior decisions on *constitutional* issues: *Helvering* v. *Producers Corp.*, 303 U. S. 376; *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Graves* v. *New York*, 306 U. S. 466; *O'Malley* v. *Woodrough*, 307 U. S. 277; *Madden* v. *Kentucky*, 309 U. S. 83; *Tigner* v. *Texas*, 310 U. S. 141; *United States* v. *Darby*, 312 U. S. 100; *United States* v. *Chicago, M., St. P. R. Co.*, 312 U. S. 592; *California* v. *Thompson*, 313 U. S. 109; *Olsen* v. *Nebraska*, 313 U. S. 236; *Alabama* v. *King & Boozer*, 314 U. S. 1; *State Tax Comm'n* v. *Aldrich*, 316 U. S. 174; *Williams* v. *North Carolina*, 317 U. S. 287; *Jones* v. *Opelika*, 319 U. S. 103; *Board of Education* v. *Barnette*, 319 U. S. 624; *Smith* v. *Allwright*, 321 U. S. 649; *United States* v. *Underwriters Assn.*, 322 U. S. 533; *Angel* v. *Bullington*, 330 U. S. 183; *Sherrer* v. *Sherrer*, 334 U. S. 343; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525; *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342; *United States* v. *Rabinowitz*, 339 U. S. 56; *Burstyn* v. *Wilson*, 343 U. S. 495.

For cases *expressly* overruling decisions involving *non-constitutional* questions during the same period, see: *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591; *Mercoid Corporation* v. *Mid-Continent Co.*, 320 U. S. 661; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575; *Nye* v. *United States*, 313 U. S. 33; *Girouard* v. *United States*, 328 U. S. 61; *Helvering* v. *Hallock*, 309 U. S. 106; *Commissioner* v. *Church*, 335 U. S. 632; *Cosmopolitan Co.* v. *McAllister*, 337 U. S. 783.

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Marshall and others. The last two decades of American constitutional developments saw, in the main, the rejection of newly fashioned doctrines for more historic ones.

The overruling of a decision on constitutional law is, at times, not the true measure of the change. Commonly the change extends over a long period; the erosion of a precedent is gradual. The overruling does not effect an abrupt change in the law; it rather recognizes a *fait accompli*.

In other words, the distinguishing of precedents is often a gradual and reluctant way of overruling cases. In modern times, the House of Lords has rarely overruled a precedent. But as the late Professor Max Radin of the University of California has shown, it has carried the technique of distinguishing precedents "to a very high pitch of ingenuity." 32 Corn. L. Q. 137, 143. And for us the process of distinguishing may indeed do service for overruling or have the same effect.

As Justice Brandeis noted in his dissent in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 408, "Movement in constitutional interpretation and application . . . takes place also without specific overruling or qualification of the earlier cases." The process of erosion of a prior constitutional decision is a frequent phenomenon in the American reports. It could be illustrated in almost any period of American history. A recent example under the Due Process Clause is *Standard Oil Co.* v. *Peck*, 342 U. S. 382, disallowing the home State of a corporation to levy an ad valorem tax on all the barges operating on inland waters through several States, where the vessels were almost continuously outside the home State. The decision robbed *St. Louis* v. *Ferry Co.*, 11 Wall. 423, and *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, of most of their vitality, without overruling them.

I discern a similar tendency in India. I discussed in Lexture XI *Chowdhury* v. *Union of India*, 14 Sup. Ct. Jour. 29, holding a special law allowing the Sholapur Spinning & Weaving Co. to be taken over, as not violating

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the constitutional command of equal protection of the law. That was in 1950. In 1953, *Shrinivas* v. *Sholapur Spinning & Weaving Co.*, 17 Sup. Ct. Jour. 175, brought the same law before the Supreme Court on a new and different constitutional challenge. This time the constitutional guarantee against a taking of property without compensation was invoked. This time the Court held the Constitution to bar the taking, distinguishing the earlier case. One cannot read the two cases without realizing that though logically consistent, the later one deprived the first of most, if not all, of its vitality.

When an old Court is suddenly reconstituted, there will be unsettlement until the new judges have taken their positions on constitutional doctrine. During that time—which may extend a decade or more—constitutional law will be in flux. That is the necessary consequence of our system. The alternative is to let the Constitution freeze into the pattern which one generation gave it. But the Constitution was designed for the vicissitudes of time. It should never become a code, which carries overtones of one period that may be hostile to another.

So far as constitutional law is concerned, *stare decisis* must give way before the dynamic component of history. Then the cycle starts again. Today's new decision becomes a coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new *status quo*. It then takes an oncoming group from a new generation to catch the broader vision which may require the undoing of the work of their predecessors.

That is the way it must be if the Constitution is to remain a living, vital force in the affairs of each generation.

B. *Judicial Review.*

In 1929, Lord Sankey, then the Lord Chancellor of England, spoke of the majestic function performed by the judiciary:

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"Amid the cross-currents and shifting sands of public life the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice." *

In the same mood, the Committee on Ministers' Powers Report (1932) p. 114, ~~wrote~~ stated:

"We are . . . unanimously of opinion that no considerations of administrative convenience, or executive efficiency, should be allowed to weaken the control of the Courts, and that no obstacle should be placed by Parliament in the way of the subject's unimpeded access to them."

These views need renewed emphasis today in America. For there has been a trend to weaken judicial authority and to aggrandize legislative authority. The trend has been growing in this century. But it reflects an appetite which is not new to legislatures. We experienced such tendencies before.

In 1781, Thomas Jefferson was greatly worried by the power of the legislative branch of government. He sounded an alarm and deplored the trend of events:

"All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among

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*Quoted in Hewart, *The New Despotism* (1929) p. 151.

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several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have, accordingly, in many instances, decided rights which should have been left to judiciary controversy; and the direction of the executive, during the whole time of their session, is becoming habitual and familiar. And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. But it will not be a very long time. Mankind soon learn to make interested uses of every right and power which they possess, or may assume." *Notes on Virginia*, in Vol. II, *The Writings of Thomas Jefferson* (Memorial ed. 1903), pp. 162–164.

Jefferson knew of the excursions of the British Parliament into the judicial field. The legislature had punished men by legislative *fiat*. They called acts treason which were not treason when committed. The legislature, bent on political revenge or on vindication of party principle convicted men on testimony that courts would not admit, violating established rules of evidence. Where the law provided one penalty, the legislature sometimes

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applied a heavier one. As Justice Chase said in *Calder* v. *Bull*, 3 Dall. 386,

"The ground for the exercise of such *legislative* power was this, that the *safety* of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when *discovered*, could be so formidable, or the government so insecure! With very few exceptions, the advocates of *such* laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similar, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of *attainder;* or any *ex post facto law.*" *Id.*, 389.

The Virginia Declaration of Rights* of June 12, 1776, sounded the alarm against legislative encroachments on the liberties of the citizen. It asked for the separation of the legislative and executive powers from the judiciary. It also asked specific guarantees against the oppressive practices of both the legislative and the executive branches. Here are found the seeds of the American Bill of Rights. Here also is a statement of fundamental rights that are at least ~~kin~~ akin to the guarantees in the Indian Constitution.

Roscoe Pound in *The Formative Era of American Law* (1938) has related how the American legislatures up to the middle of the last century thought of themselves as the dominant power of the nation:

"As late as the impeachment of Andrew Johnson it was confidently asserted that the executive was accountable to the legislative for the exercise of powers committed to the executive by the Constitution. All through the formative era legislative assemblies assumed that courts were accountable to them for the way in which they decided controversies. State legislatures summoned judges before them to be interrogated as to particular decisions exactly after the manner of the famous colloquy

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*Appendix I, Lecture VIII.

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between James I and the judges of England. There was an idea of legislative omnicompetence. The earlier legislatures did not hesitate to enact statutes reversing judgments of the courts in particular cases. They sought to admit to probate wills rejected by the courts. They sought to dictate the details of administration of particular estates. By special laws they directed the details of local government for particular instances. They validated particular invalid marriages. They suspended the statute of limitations for a particular litigant in a particular case. They exempted a particular wrongdoer from liability for a particular wrong for which his neighbors would be held by the general law." *Id.*, 39–40.

In America, the pendulum swung away from the legislatures and toward the courts. It swung so far that by the turn of the century the judiciary assumed the dominant role. The reasons were varied, as Pound's analysis shows. *Id.*, 49 *et seq.*

The period of judicial supremacy was not to last long. By the mid-twentieth century the pendulum had swung again. This time legislative power overshadowed the other branches.

The judiciary lost some of its powers by forsaking the role of the super-legislature that it had assumed last century and in the first decades of the present century. But the principal reasons for the growth of legislative power at the expense of the other branches were: *first*, the massive appropriations made necessary by the world wars and by the great depression of the 1930's, and *second*, the vast growth of the federal bureaucracy. The power of government shifted from state to federal channels. Within the federal system, the power gravitated to the legislative branch. The hold which the legislature has over the purse strings makes its voice more and more felt. And, although the administrative agencies are parts of the executive branch, they are sensitive to congressional desires; they are subject to accounting at the hands of congressional committees; they are welded

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closely to congressional groups through a wide variety of lobbying agencies.

This growth in legislative power has had an important impact on both the executive and the judiciary.

Walter Lippmann in *The Public Philosophy* (1955) shows how the legislative branch more and more dominates the executive in the western world. The illustrations are numerous and needless to relate. In general, however, the legislative branch has more and more molded foreign policy, if not dictated it. More and more has the executive branch been under restraints of the legislative branch.

Lippmann has traced some of the ominous aspects of the tendency in the western world to subordinate executive power to legislative power. I mention it only in passing. For the main concern of these Lectures is with judicial power. It too has been eroded as legislative power has become more dominant.

The administrative agency is one example. The voice of the administrative agency has often been more powerful than that of the courts in disputes between competing interests. Judicial review of administrative action has of necessity been narrow and confined. Agency action has not carried finality as a matter of law; but it has been well-nigh conclusive in the run of cases. Agency action may involve liberty as well as property, the right to pursue a calling, as well as the right to indulge in certain business practices. Agency action speaks with decisiveness in the vital affairs of men. Courts are far removed from those contests and exert only a minor influence. This is not an erosion of judicial power in the sense of cutting down the courts' jurisdiction. It is, however, an erosion in the sense of a gradual displacement of judicial authority with administrative authority.

This growth of administrative authority has been a startling phenomenon. In 1818 a New Hampshire court held unconstitutional an act of the legislature awarding a new trial to a litigant in a probate case. *Merrill* v.

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Sherburne, 1 N. H. 199. The court noted that "a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct; the latter make rules, upon which, in connexion with the constitution, these decisions should be founded." *Id.*, 204.

The judgment was sound by modern standards. But the concept of judicial power which the opinion reflects, and which was prevalent a century ago, has vastly changed. For today administrative agencies, as well as courts, "decide upon the legality of claims and conduct."

The administrative agency making the decision is closer to the political arena than the courts. Its members lack life tenure. Pressures that would be intolerable if applied to courts are constantly applied to the agencies. The "wrong" decision may result in an agency chairman answering to a congressional committee. Its procedures are sometimes intolerable by judicial standards.

This dilution in the power of courts is regretted by some because it deprives courts of power. That is not my primary concern. What gives me chief concern is the manner in which the liberty of the citizen suffers when he is subjected to unfair procedures.

One who for long views the administrative process from the vantage point of an appellate court is impressed with the variety of unfair practices and procedures that the administrative process nourishes. The records coming from the agencies show how rough-shod their approach often is. That procedure gives them flexibility, to be sure; but it often imperils the rights of the citizen and produces injustice.

A dramatic illustration, though by no means an isolated one, is *Bailey* v. *Richardson*, 182 F. 2d 46, which was affirmed by an equally divided Supreme Court. 341 U. S. 918. Miss Bailey was a government employee being screened by a Loyalty Board established in the Executive branch. The Board was empowered to disqualify a person for federal employment if "on all the

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evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

Miss Bailey answered all the questions put to her by the Board and her answers were direct and specific. She asked an administrative hearing and one was granted her. At this hearing she testified and presented other witnesses who testified. No one appeared against her.

The Board rated her as ineligible for federal employment, finding that "reasonable grounds exist for belief" that she was "disloyal" to the United States. Miss Bailey appealed to the Review Board where she was given another hearing. No one other than she testified; and no affidavits other than hers were offered. The Review Board upheld the lower Board and

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The problem of the Bailey case came before the Court once more in eters v. Hobby, 349 U.S.____. Dr. Peters had been cleared of disloy harges by an administrative agency, but a Review Board had reexamined is case on its own motion and concluded that grounds for discharge xisted. This conclusion was based on information supplied by "faceless informers" unknown to either Dr. Peters or the Review Board, information which Dr. Peters had no chance to refute by the time-tested method of cross-examination. Dr. Peters contended that this procedure violated the requirements of Due Proeess. A majority of the Court declined to reach the constitutional problems involved. The Court roundly denounced the Review Board, holding that the Board had no authority under the applicable Executive Order to conduct such review on its own motion.

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Miss Bailey thereupon brought an action for declaratory judgment and an order directing her reinstatement.

It appeared that Miss Bailey was charged with being a Communist and with being active in a Communist "front organization." The Review Board stated that the case against her was based on reports, some of which came from "informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable."

Her counsel asked that their names be disclosed. The request was refused.

Her counsel asked if these informants had been active in a certain union. The chairman of the Review Board replied, "I haven't the slightest knowledge as to who they were or how active they have been in anything."

Her counsel asked if those statements were under oath. The chairman answered, "I don't think so."

The truth is that the Loyalty Board discharged Miss Bailey on evidence it could not even appraise. The critical evidence of the unknown witness might have been the word of a person who, to use the words of Alan Barth in *The Loyalty of Free Men* (1951) p. 109, was "a paragon of veracity, a knave, or the village idiot." His iden-

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tity, his reputation, his prejudices, his animus toward Miss Bailey, his trustworthiness were unknown ~~both~~ to the administrative agency, to the accused employee; and to the reviewing court. The accused employee had no opportunity to show that the witness was venal, that he bore an old grudge, that he had an ax to grind in having her discharged. Without knowing who the accuser was the employee had no way of defending. Her only defense was her own word and the character testimony of her friends. As dissenting Justices stated at the time:

"Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice." See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 180.

The courts ~~allowed~~ permitted the growth of procedural rules and practices that were unfair to the citizen. Faceless informers grew in stature. Secret reports were used to condemn people—not to death but to the ranks of the jobless. The courts were not mindful of the advice of Justice Brandeis given years before,

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States*, 277 U. S. 438, 479.

The United States had an important problem to solve in ferreting out subversive agents, worming their way into government to ascertain secrets or to influence policy. The problem was to sort them out in a way that was fair to the innocent and guilty alike. Essentially unfair pro-

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cedures cannot produce fair hearings. Yet ~~neither the executive branch nor~~ the judicial branch ~~had the genius to design~~ the appropriate procedure.

The administrative agency moved more and more to the forefront as a censor of peoples' lives and activities. Lists of so-called "subversive" agencies were published by the government in proceedings that seemed to some judges to violate due process of law. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123. And these lists had widespread impact across the nation. Teachers who were members of listed groups could not hold their jobs. *Adler* v. *Board of Education*, 342 U. S. 485. They had wide repercussions in the business community, driving customers from the doors of these organizations and sending them into bankruptcy or eclipse.

The probings by government agencies seemed endless. Not only were employees of state and federal governments discharged under procedures that were unfair by conventional legal standards. Men were discharged from their professions, not by reason of unfitness, but because of their unpopular political beliefs. *Barsky* v. *Board of Regents*, 347 U. S. 442.

The catalogue of these transgressions is unimportant. The important fact is that the ~~executive and~~ judicial ~~branches were~~ lax in ~~their~~ insistence upon fair procedures. As a consequence, those who could command effective control over organs of publicity and propaganda brought great pressure to bear upon employees, school boards, government agencies, churches, and all other types of organizations to discharge those who were deemed "subversive."

Great impetus was given this drive by congressional committees investigating various aspects of American life. The excesses of these committees are notorious, all as recorded in Barth, *Government by Investigation* and Taylor, *Grand Inquest*. Men were charged with all sorts of high crimes and misdemeanors by accusers who spoke under the protection of congressional immunity. They

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were pilloried before committees and given what a layman would consider a trial for their so-called offenses.

Often their offenses pertained to what they thought, not to what they had done. Men would be examined as to their political beliefs.

This growth of power in the administrative agency and in the congressional committee enabled those groups to use their authority as a powerful leverage over people and institutions. There seemed to be no restraint to their activities. Few restraints were self-imposed. Few statutes provided procedural safeguards. The courts were reluctant to interfere.

That chapter in American history shows the need for procedural rules that will insure fair hearings both before administrative agencies and congressional committees. Courts cannot fashion these rules; their drafting is for the legislative and executive branches. A fair hearing, however, demands minimum requirements.

The minimum requirements for fair hearings include the right to counsel. The average citizen is helpless before an agency or committee without the aid of an experienced hand.

A fair hearing also requires that anyone giving evidence against the citizen face the accused and submit to cross-examination. As stated by the dissenters in *United States* v. *Nugent*, 346 U. S. 1, 13–14:

"The use of statements by informers who need not confront the person under investigation or accusation has such an infamous history that it should be rooted out from our procedure. A hearing at which these faceless people are allowed to present their whispered rumors and yet escape the test and torture of cross-examination is not a hearing in the Anglo-American sense. We should be done with the practice—whether the life of a man is at stake, or his reputation, or any matter touching upon his status or his rights. If FBI reports are disclosed in administrative or judicial proceedings, it may be that valuable underground sources will dry up. But that is not

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the choice. If the aim is to protect the underground of informers, the FBI report need not be used. If it is used, then fairness requires that the names of the accusers be disclosed. Without the identity of the informer the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination."

The realm of the conscience should be placed beyond the reach of government. Political beliefs, like religious convictions, are one's own business. One should not be subject to an accounting for anything but his conduct.*

Man's struggle for freedom in the western world has largely been an effort to be free from the inquisition. The inquisition sought out the heretics—those who had deviated from the "true" faith. Man finally realized that there was too much diversity in life to regiment men under a single political creed, a single religion, a single school of philosophy. Yet once an agency or committee can probe one's secret thoughts or basic philosophy of life, the citizen can become the victim of an ugly public mood. Once that happens, the inquisition has returned under a new form.

The aim of procedural reforms should be to give an accused at least the same degree of protection and the same quality of safeguards when his reputation and his right to work are being litigated,** as when his property

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*Those who support the legislative power to investigate the area of beliefs ground their position on *Dennis* v. *United States*, 341 U. S. 494, and related cases discussed in Lecture IX, which hold that Congress or a state legislature may restrict free expression where there is felt to be a "clear and present danger." Under that view, it is urged that Congress may investigate to determine whether a clear and present danger exists calling for legislative action. The reach of the investigative power and its impact on First Amendment right was considered in *Barsky* v. *United States*, 167 F. 2d 241, and *United States* v. *Josephson*, 165 F. 2d 82, discussed in Lecture IV.

**Berle, *The 20th Century Capitalist Revolution* (1954) tells how business corporations having contracts with the federal government

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is jeopardized. Whenever government reaches into the lives of citizens to deprive them of rights or to restrict their liberty, the steps it takes should be strictly measured by due process of law.*

The point is well-illustrated by a recent ruling of the Supreme Court of India in *Dhakeswari Cotton Mills* v. *Commissioner*, 42 A. I. R. 65. The case involved an assessment for taxes on gross profits. The income tax officer estimated the gross profit at 40 per cent of the sales by "a pure guess" and the agency (tribunal) reviewing the assessment reduced it to 35 per cent "by applying some other rule of thumb." *Id.*, 68. But the factual

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became executors of the loyalty program of the government, discharging those of its employees who were charged with being subversive or who on investigation invoked the protection of the Fifth Amendment. Berle discusses the need for new procedural remedies against the impairment of a man's liberty by cutting off his opportunities for employment:

"If General Electric or General Motors or International Harvester were to imprison a man, writ of *habeas corpus* would lie at once. Because in modern practice a man's liberty may be impaired without seizing his body, rather by cutting off his opportunity to work, the historic writ of *habeas corpus* no longer fits. But surely an equivalent writ, directing a corporation to show cause why a man has been declared unemployable, could be worked out. The drafting of Federal and state statutes to this end would call for a certain amount of ingenuity and solid measure of historical perspective." *Id.*, 106–107.

*A leading American lawyer, active in the field of civil liberties, has written:

"There is no excuse now, if there ever was, for investigating committees to call individuals to the bar of public opinion and in fact to put them on trial and to inflict punishment upon them. This is a task for the courts. If our laws and law-enforcement personnel are not adequate to bring persons engaged in subversive activity before the bar of justice and to obtain convictions where merited, it is our job and the job of Congress to make them adequate.

"So long, however, as congressional investigating committees continue, in fact, to accuse individuals of high crimes, to compel their testimony, to present information against them, and to pass judgment upon them, they should be subject to the basic requirements of due process." Fortas, *Abusive Practices of Investigating Committees*, 29 Notre Dame Lawyer 192, 206.

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bases of those decisions were not disclosed. The Court held first that the power to review agency action granted by Article 136 of the Constitution (discussed in Lecture V) was a guarantee against arbitrary action.

"It is, however, plain that when the court reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of this article is that it is the duty of this court to see that injustice is not perpetuated or perpetrated by decisions of courts and tribunals because certain laws have made the decisions of these courts or Tribunals final and conclusive." *Id.*, 69.

Secondly, the Court held that the executive officer making the assessment was not entitled to act on the basis of "pure guess" or "bare suspicion" but only on a record made after a fair hearing.

"In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income-tax Officer and the Tribunal seems to be based on surmises, suspicions and conjectures." *Id.*, 70.

The judiciary cannot, of course, make a lawsuit out of every congressional inquiry nor saddle administrative agencies with all the paraphernalia of court trials. Moreover, abiding reforms come not only from procedural reforms but also from the force of public opinion and an attitude of tolerance and fairness that permeates every agency and committee in the land. The judiciary plays

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an important role in educating the people as well as in deciding cases. It can and should, in the critical crises that affect the reputations and fortunes of men, ~~call a halt when injustices are being done~~. The judiciary sits in a quiet and dignified place, one that is far removed from the tumult and passions of crowds. It sits to make sure in cases coming before it that not even the humblest or the most unpopular citizen is the victim of any intolerance that sweeps the country.

Those who ever doubt the need for procedural requirements governing every tribunal sitting in judgment on the rights of man should read *The Great Peace* (1953), written by a distinguished Indian, Raja Hutheesing. His account of a trial in Red China is an abiding testimonial to the importance of procedure.

"On the stage sat the Chief Justice of China, an elderly international jurist; Po Yi-po, the Minister of Finance; the Chairman of the Central Austerity Inspection Department; and the man who organized the first guerrilla resistance. In front were the seven victims, facing the crowd. They were brought in by armed men who stood behind them once they had taken their places. The victims stood with their eyes looking on the ground and their hands behind their backs. From their shoulders hung long streamers reaching to their feet describing them as criminals and traitors. The crowd of men and women sat quietly waiting for their cues to hurl abuse and insults at the victims.

"Po Yi-po in his charge asserted that the loss to the state from the activities of the accused amounted to as much as 45 million dollars. 'This could have bought 18 million catties of food grains and helped to feed 280,000 men for a whole year, or China could have purchased 66 fighter planes for the defense against American imperialism.' Loud and prolonged shouts called for the blood of the traitors.

"Po Yi-po continued: 'If the corruption spread to the whole country on this scale, the people would be deprived

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of capital which would be enough to set up 10 modernized factories each employing 2,000 to 3,000 men and set back the industrial progress of the country.' He then spoke of the evidence against each defendant and described their heinous crimes against the people. The speech was interrupted repeatedly by shouts for direct retribution from the audience. The shouting appeared to be prearranged and the cries were taken up by one corner, then another, till the crowd was whipped into a furious mob. Radio, telephones and cinemas were impressed into the service of this fury and people phoned from their homes to the court asking for the death penalty.

"According to the Communist theory the law courts are instruments of mass condemnation. 'The judgment must come as a climax to mass mobilization so that when the sentence is passed masses will rise in fury against the accused.' The purpose of such public trials is to strike terror and let loose the forces of mob passion against the 'enemy.' After Po Yi-po sat down, the crowd shouted and screamed for the blood of the victims offered to them. They threw rotten eggs, tomatoes and stones at their prey, who could not lift their faces and look at the crowd or the judges. There was no examination of the accused and they were given no chance to reply to the charges. The Chief Justice got up and sentenced two of the accused to death, four to varying terms of imprisonment, and released one who immediately went and sat in the crowd and joined in the denunciation of those found guilty." *Id.*, 201–203.

The judiciary of India and of the West have rejected that procedure. We who are committed to constitutional government stand against the degeneration of any agency or tribunal to that level. The judiciary alone may not be able to prevent the growth of such atrocious practices. But it can exert a mighty influence.

The judiciary has no army or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse strings of government. Those

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two historic sources of power rest in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the product of time and experience. But they flourish when judges are independent and courageous. The court that raises its hand against the mob may be temporarily unpopular; but it soon wins the confidence of the nation. The court that fails to stand before the mob is not worthy of the great tradition.

The judiciary is in a high sense the guardian of the conscience of the people as well as of the law of the land. It is much further removed from the political arena than the administrative agencies or the legislative. It sits aloof and detached from the community, not subject to the political stresses and storms of the other branches. It is made up of men who have tenure and other protections against the political forces of the day. Its decisions are more apt to reflect tradition and first principles than political expediency.

Judicial review gives time for the sober second thought. It interrupts the administrative process, to be sure, and makes it more time-consuming. But there are few decisions that must move pell-mell into action. The cooling period is good for most hotly-contested issues. And where basic fundamental rights of the citizen are at stake, the contemplative pause, necessitated by judicial review, may be critical. The confidence of the citizen in modern government is increased by more, rather than less, judicial review of the administrative process. It assures that basic unfairness will be corrected. And the administrator who knows he must ultimately account to a judicial body for his actions will tend to be a more responsible public official.